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FAILING THE ARTICLE 31 UCMJ TEST; THE ROLE OF THE NAVY INSPECTOR GENERAL IN THE INVESTIGATION OF THE NAVAL ACADEMY CHEATING SCANDAL*

Lieutenant Brent G. Filbert, JAGC, USN **

I. INTRODUCTION

From December 1992 to January 1993, the Naval Criminal Investigative Service (NCIS) conducted an investigation into the suspected compromise of the final examination in the Electrical Engineering (EE) 311 course at the United States Naval Academy.[1] During its investigation, NCIS afforded midshipmen the protections against self-incrimination contained in Article 31 of the Uniform Code of Military Justice (UCMJ).[2] Subsequently,

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1 Naval Inspector General Report of Investigation (Jan. 20, 1994) at 1, 5 [hereinafter NAVINSGEN Report]. Electrical Engineering is a required course for all non-engineering majors taken during the second class year (when they are juniors).

2 NAVINSGEN Report at 1, 5; 10 U.S.C. § 831 (1994) (Article 31, UCMJ) provides as follows:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

the Navy Inspector General (NAVINSGEN) conducted a well-publicized "administrative investigation" into the exam compromise.[3] In this inquiry, the NAVINSGEN concluded that Article 31 did not apply. Consequently, the NAVINSGEN investigators did not provide midshipmen with warnings under Article 31(b), and ordered midshipmen to divulge all information regarding the exam compromise.[4] The Navy presented the results of the NAVINSGEN inquiry in subsequent administrative proceedings against midshipmen accused of lying or cheating.[5]

This article examines whether the Navy violated the Article 31 rights of midshipmen during the EE 311 inquiry and will consider the relationship of Article 31 to other administrative proceedings in the military. This article reviews the statutory language of Article 31, case law, legislative intent, and policy considerations relevant to these issues.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

3 NAVINSGEN Report at 9, 12.

4 *Id.* at 2; Petition for Extraordinary Relief at 4-5, Steve v. Dalton, No. 94-8081/NA (C.M.A. Feb. 18, 1994) [hereinafter Petition]; Complaint for Declaratory and Injunctive Relief at 22-23, Barbour v. Dalton, No. 94-261 (D. D.C. Feb. 23 1994) [hereinafter Complaint].

5 Justin Blum, *At the Naval Academy, a Grueling Metamorphosis Begins*, Washington Post, Jul. 2, 1994, at B4, col. 1; *Twenty-four Midshipmen will be Expelled in Naval Academy Cheating Scandal*, The Commercial Appeal, Apr. 29, 1994, at 2A; *Academy Plans to Expel Twenty-four in Cheating Case*, The Virginian-Pilot, April 29, 1994, at A2. Following completion of the NAVINSGEN inspection, some midshipmen sought to stay the honor board proceedings by filing for injunctive relief in the United States District Court for the District of Columbia and the Court of Military Appeals. The midshipmen based their petitions in part on the Navy's failure to adhere to Article 31. Both courts dismissed these petitions. *See* Steve v. Dalton, No. 94-8081/NA (C.M.A. Feb. 18, 1994) (dismissed without opinion); Barbour v. Dalton, No. 94-261(D. D.C. Feb. 23, 1994) (dismissed claim based on Article 31 as not "ripe for resolution").

II. EXAM COMPROMISE AND INVESTIGATIONS

After learning of the possible compromise of the EE 311 final examination, the Superintendent of the Academy requested that NCIS conduct an investigation.[6] During its inquiry, NCIS warned midshipmen suspected of UCMJ violations of their self-incrimination rights under Article 31(b).[7] NCIS eventually identified thirty-nine midshipmen it believed cheated on the test.[8] Twenty-four of those midshipmen were sent before Academy honor boards, and, ultimately, the Superintendent recommended separation of six midshipmen from the Academy.[9]

Because of Congressional concern regarding the fairness and thoroughness of the investigatory and adjudicatory process, the Secretary of the Navy (SECNAV) ordered an additional inquiry by the NAVINSGEN.[10] Relying upon its conclusion that the inquiry was "administrative," the

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6 NAVINSGEN Report at 4-5. The Academy initially believed that the exam compromise was not widespread; however, additional information surfaced indicating that the compromise was extensive. NAVINSGEN Report at 4.

7 *Id.* at 5. NCIS advised midshipmen that they were suspected of offenses such as Conduct Unbecoming an Officer and Gentleman, Larceny, and Receiving Stolen Property.

8 *Id.* at 7.

9 *Id.* at 6-8. The Academy honor concept provides that "[m]idshipmen are persons of integrity: They do not lie, cheat or steal." United States Naval Academy Instruction 1610.3E ¶ 0101 (Dec. 20, 1990) [hereinafter USNAINST 1610.3E]. This instruction has been superseded by United States Naval Academy Instruction 1610.3F (Mar. 17, 1994) [hereinafter USNAINST 1610.3F). The honor concept establishes an administrative process by which violations are investigated by honor boards made up of midshipmen. The Commandant of Midshipmen reviews the findings of the honor boards at a subsequent hearing where he or she may return the case for further investigation, impose administrative punishments (restriction, loss of privileges, etc.), or forward the case to the Superintendent, recommending separation of the accused midshipman. The Superintendent conducts a third hearing if separation is recommended by the Commandant. The Superintendent may return the case to Commandant for administrative punishment, or recommend discharge of the midshipmen to the Secretary of the Navy. USNAINST 1610.3E at ¶¶ 0409-0411. The Secretary of the Navy must approve the separation of all midshipmen for honor or conduct offenses. 10 U.S.C. §§ 6961-6962 (1988).

10 Lincoln Caplan, *Gouging the Honor System*, Newsweek, 33 (Jun. 6, 1994); *Cheating Probe Reviewed*, The Atlanta Journal and Constitution, Jun. 7, 1993, at 12A, col. 1.

NAVINSGEN investigators did not warn midshipmen suspected "only" of lying or cheating of their self-incrimination rights under Article 31(b), and ordered midshipmen to provide incriminating information regarding the compromise.[11] The NAVINSGEN concluded that this "noncriminal" inquiry was preferable because such an investigation would not result in the "suppression of admissions" at future administrative proceedings.[12]

The NAVINSGEN interviewed over 800 midshipmen, including all midshipmen in the EE 311 course, as well as roommates, teammates, and company mates of those midshipmen suspected of cheating.[13] Special honor boards made up of naval officers found eighty-eight midshipmen guilty of lying or cheating, or both.[14] Ultimately, SECNAV separated

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11 NAVINSGEN Report, at 9. The NAVINSGEN investigators had the authority to provide warnings under Article 31(b), UCMJ, to midshipmen suspected of "more than cheating" in order to "preserve the possibility of criminal prosecution." Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction at 6 n. 6, Barnes v. Dalton, No, 94-0216 (D.D.C. February 23, 1994) [hereinafter Memorandum].

12 *Id.* at 9,12. The SECNAV, as well as the Judge Advocate General of the Navy and General Counsel of the Navy, approved of the decision to conduct the investigation in this manner. Since the midshipmen did not have the right to remain silent, they had the duty to provide information relating to the exam compromise and could be ordered to do so.

13 *Id.*

14 *Id.* at 10. The NAVINSGEN eventually developed cases against 133 midshipmen. Because of the large number of cases, the Superintendent concluded that the honor review system could not handle the cases in an expeditious manner. Consequently, he convened a board of three retired Navy flag officers [hereinafter the Edney Board] to determine whether there were "reasonable grounds that an honor violation was committed by the individual." The Edney Board forwarded 110 cases for further processing for honor violations, and recommended that the Academy handle the remaining cases through measures short of separation. In his report, the NAVINSGEN recommended referral of the cases to a forum other than Academy honor boards for resolution. The Chief of Naval Operations (CNO) approved this recommendation and established a board made up of senior active duty naval officers [hereinafter the Allen Board]. He also removed the Superintendent and Commandant from the honor review process. The SECNAV and the CNO made these decisions based on their determination that the Brigade of Midshipmen perceived bias on the part the Superintendent and Commandant in their handling of the EE 311 cases and because "a climate was created and/or allowed to exist at the Academy that resulted in a failure of leadership, staff, and midshipmen, to understand, embrace, and / or support the Honor Concept." In convening the Allen Board, the CNO provided the

twenty-four of those midshipmen, while sixty-four received lesser punishments, including restriction, loss of leave or loss of privileges.[15]

III. DID THE NAVINSGEN VIOLATE ARTICLE 31, UCMJ?

Articles 31(a) and (b) provide as follows:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from an accused or person suspected of an offense without first informing him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Articles 31(a) and (b) use the broadest possible language to limit "persons subject to the code" from infringing upon the self-incrimination rights of service members. Neither section discerns between different types of investigations, nor do the provisions inquire into the purpose of the questioning.[16]

Based on the above statutory language, the Navy apparently did not comply with Article 31(a) and (b) during the EE 311 proceedings. How did Navy justify its seeming noncompliance with those provisions? In conducting its inquiry, the NAVINSGEN took the position that Article 31 did not apply because lying and cheating by midshipmen is not criminal.[17] The NAVISNGEN reasoned that Article 31 only applies in investigations of

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midshipmen with the right to remain silent at the honor hearing. Memorandum at 6-11.

15 Caplan, *supra* note 10, at 33; Virginian-Pilot, Apr. 29, 1994, at A2.

16 NAVINSGEN Report at 2.

17 Memorandum at 30-32.

criminal conduct.[18] As a result, midshipmen suspected of administrative violations (i.e., lying and cheating) were not afforded Article 31 protections. The Navy, in defending the decision not to recognize Article 31's applicability to the EE 311 inquiry, asserted that suspected liars and cheaters did not "incriminate" themselves because the Navy did not intend to prosecute this category of midshipmen at court-martial.[19] That is, the Navy contended that the privilege against self-incrimination depends solely on the government's intent to use a declarant's statements at court-martial.

IV. CRIMINAL VERSUS NONCRIMINAL CONDUCT

In order to avoid the warning requirements of Article 31, the NAVINSGEN contended that lying and cheating by midshipmen was not criminal for purposes of Article 31. The NAVINSGEN Report of Investigation on the Compromise of the EE 311 Exam criticized Naval Academy officials on the following grounds:

> 57. The NCIS was requested to conduct an investigation into the compromise on the initial theory that a criminal offense, such as larceny or breaking and entering may have occurred. It quickly became evident, however, that the origin of the compromised examination was not clear *and that a felony offense had not been established.* Nonetheless, in order to satisfy statutory requirements in criminal investigations, almost all midshipmen interviewed (interrogated) were advised of their rights against self incrimination as set forth in Article 31(b), UCMJ. *This procedure had the cumulative effect of insulating the midshipmen from their military duty to respond to questions about the compromise.*
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> 58. In addition, NCIS, as the principal Navy organization chartered, trained and manned to conduct criminal investigations, conducted the investigation consistent with that charter. That is, the investigation focused on criminal activity. Conduct in violation of the Honor Concept, such

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[18] NAVINSGEN Report at 12.

[19] *Id.* at 9; Memorandum at 30-34; *see* U.S. Const. amend. V ("no person . . . shall be compelled in any criminal case to be a witness against himself").

> as cheating, is not normally within the NCIS charter and therefore the NCIS agents did not pursue that issue to completion during their investigation. Senior Academy officials apparently never considered whether an NCIS investigation remained appropriate after the Superintendent's decision not to court-martial those accused only of cheating. Although the principal NCIS Special Agent frequently briefed CAPT DeCarlo on the progress of the investigation, CAPT DeCarlo did not reconsider the decision to request NCIS to conduct a criminal investigation, and did not consider alternative forms of investigation in order to determine the actual extent of the cheating. Two such alternatives could have been: (1) requesting that NCIS assist the Academy *by conducting an investigation using less stringent administrative procedures;* or (2) convening an alternative inquiry, such as an investigation under the provisions of the Manual of the Judge Advocate General. . . .[20]

An examination of the UCMJ quickly shows that the rationale is erroneous. Article 133, UCMJ, Conduct Unbecoming an Officer and Gentleman, a punitive article expressly applicable to midshipmen, specifically provides that cheating on an exam violates its provisions.[21] Likewise, lying to military investigators is a violation of Article 107, UCMJ, False Official Statement.[22] Both offenses are prosecutable at every level of courts-martial.[23] Thus, the distinction made by the NAVINSGEN is untenable—if the actions of the member violate the provisions of the UCMJ, then the activity is criminal, irrespective of the relative seriousness of the offense or that the conduct may be judged at forums other than courts-

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20 *Id.* at 9 (emphasis added).

21 10 U.S.C. § 933 (1988); Manual for Courts-Martial, United States, pt. IV, ¶ 59c(3) (1984) [hereinafter MCM].

22 10 U.S.C. § 907 (1988); *see* United States v. Prater, 32 M.J. 433, 438 (C.M.A. 1992); United States v. Frazier, 34 M.J. 135, 138 (C.M.A. 1992) (suspect lying to military investigator violates Article 107, UCMJ).

23 10 U.S.C. §§ 818-20 (1988) (Articles 18-20, UCMJ).

martial.[24] Were one to apply the NAVINSGEN's logic in classifying these crimes as "non-criminal" to other common military settings, a command could decide that use of a controlled substance is not "criminal activity," because such wrongdoing is typically addressed at nonjudicial punishment and / or administrative separation proceedings.[25]

The above discussion demonstrates that the government cannot limit the applicability of Article 31 by simply labeling violations of the UCMJ as noncriminal. What about the related position taken by the Navy that the intended use of the evidence at courts-martial controls the applicability of Article 31? The following discussion focuses on the legislative history, case law and policy considerations related to this issue.

V. LEGISLATIVE HISTORY

The legislative history of Article 31 demonstrates that Congress designed Article 31 to apply in the broadest possible manner.[26] The reports of the Armed Services Committees for both the Senate and House of Representatives specifically provide that Article 31(a) extends the privilege against self-incrimination "to all persons under all circumstances."[27] Therefore, it is not surprising that the hearings and committee reports do not indicate an intent on the part of Congress to limit the protections in Article 31(a) to particular types of inquiry;[28] rather, Congress sought to prohibit,

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24 The NAVINSGEN also criticized the involvement of NCIS on the basis that the investigation did not involve "felony" offenses. NAVINSGEN Report at 12. This is a misstatement of the law, as well—both Article 133 and 107 are felony offenses. The maximum penalty for a violation of Article 133 is dismissal, forfeiture of all pay and allowances and confinement for one year. *See* MCM, part IV, para. 59e. Article 107 provides for identical punishments, except increases the maximum confinement to five years. *See* MCM, part IV, para. 31e.

25 *See* 10 U.S.C. § § 815 and 912a (Articles 15 and 112a, UCMJ); Naval Military Personnel Manual, art. 3630620 (1994) [hereinafter MILPERSMAN].

26 *See infra* note 27 and accompanying text.

27 S. Rep. No. 486, 81st Cong., 1st Sess. 16 (1949); H. R. Rep. No. 491, 81st Cong., 1st Sess., 19 (1949).

28 *See* Judge Advocate General of the Navy, Index and Legislative History of the Uniform Code of Military Justice (1950).

on a service-wide basis, the compulsion of incriminating information from servicemembers.[29]

In passing Article 31, Congress hoped to broaden the protections against self-incrimination found in the Articles of War and the Articles for the Government of the Navy.[30] Significantly, Section 24 of the Articles of War, the predecessor to Article 31, already granted the right against self-incrimination to persons appearing before a "*commission, court of inquiry, or board, or before any officer conducting an investigation.*"[31] Thus, at the time Congress enacted Article 31 the protection against self-incrimination existed during all inquiries, administrative or otherwise. Surely, Congress did not intend to remove the privilege against self-incrimination from administrative investigations at the same time it was significantly broadening the scope of the right in all other respects.[32]

In a similar vein, Congress clearly intended that the warnings under Article 31(b) extend to those persons suspected or accused of an offense without regard to the intended use of obtained statements.[33] The following exchange between members of the House of Representatives Subcommittee of the Committee on the Armed Services illustrates how Congress envisioned Article 31(b) would work :

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29 *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before the Subcomm. of the Comm. on Armed Services,* 81st Cong., 1st Sess. 108 (1949) [hereinafter *Hearings on S. 857 and H.R. 4080]* (statement of Melvin J. Mass, President, Marine Corps Reserve Officers Association); *Establishing a Uniform Code of Military Justice: Hearings on S. 486,* 81st Cong., 1st Sess. 16 (1949) [hereinafter *Hearings on S. 486*] (statement of Estes Kefauver, Subcommittee Chairman); *Uniform Code of Military Justice: Hearings on H.R. 491,* 81st Cong., 1st Sess. 19 (1949) [hereinafter *Hearings on H.R. 491*].

30 *See* Manuel E. F. Supervielle, *Article 31(b): Who Should be Required to Give Warnings,* 123 Mil. L. Rev. 151, 181 (1989).

31 Act of June 4, 1920, ch. 227, 41 Stat. 792. This Act added the language "officer conducting any investigation" to the list of traditional criminal forums originally mentioned in Article of War 24. *See* Supervielle, *supra* note 30, at 174.

32 *See* Supervielle, *supra* note 30, at 181.

33 *See infra* notes 34-36 and accompanying text.

Mr. Larkin. . . . [W]e adopted this format [of Article 31] because we put in here as I mentioned the additional necessity of informing the man before you take a statement that insofar as incrimination is concerned it might be used against him.

In (a) we have just reiterated again the right not to incriminate himself.

(b) incidentally, covers a wider scope in that you can't force a man to incriminate himself beforehand—not just on the trial, if you will. . . .

Mr. Brooks. Mr. Larkin, if you are going to start revising, subsection (b) says "An accused or a person suspected of an offense." Now, what does that mean?

Mr. Larkin. Well, that is—

Mr. Brooks. How would a person know he was suspected of an offense?

Mr. Larkin. Well, after an offense has been committed a number of persons who are suspected might be brought in for questioning none of whom have been accused because the evidence is not complete enough to indicate who the perpetrator may be.

Mr. Brooks. But you can't interrogate him without first informing him of the nature of the accusation.

Mr. Larkin. That is right. You would have to tell him that the crime of larceny has been committed, for instance. You could say that this an inquiry in connection with it and that you intend to ask him questions about it, but that he should be informed that he does not have to make any statement about it.

All that does is broaden the protection of self-incrimination so that whether a person is actually the accused and you attempt to interrogate him or whether you just don't know

> who the accused is and there are five or six people whom you suspect they are all protected.[34]

The above demonstrates that Congress sought to protect service members by providing the prophylactic warnings under Article 31(b) to "not only persons who are accused of an offense but also those who are suspected of one."[35] Congress understood that the warning requirement of Article 31(b) did not exist in most civilian courts at the time it passed the UCMJ and that its inclusion would result in a person invoking the right during questioning.[36] This extra protection was to help relieve the pressure to respond to inquiries caused by rank, duty, or other similar relationship.[37] Thus, Congress in no way envisioned that the far-reaching protection of Article 31(b) was to be conditioned on the intended use of the information in criminal proceedings.

VI. CASE LAW

A. The military courts construe Articles 31(a) and (b) in significantly different ways. The Court of Military Appeals states as follows:

> . . . this Court clearly is on record that, while Article 31(a) and the Fifth Amendment coincide in scope and while Article 31(b) was enacted to serve the purpose of avoiding coerced statements in violation of both provisions, unique factors in the military environment—unknown in the civilian setting—lead us to interpret Article 31(b) as being broader in the scope of its protection than is the mandate of *Miranda*. Both the subtleties of the superior-subordinate

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34 *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Services,* 81st Cong., 1st Sess. 988-90 (1949) (statement of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense) [hereinafter *Hearings on H.R. 2498*].

35 *Hearings on S. 857 and H.R. 4080,* at 108; *Hearings on S. 486,* at 16; *Hearings on H.R. 491,* at 19; *see also Hearings on H.R. 2498,* at 984-85, 988-992.

36 *Hearings on H.R. 2498,* at 984-85, 988-992.

37 *Id.* at 985-86, 988-92.

> relationship and the conditioned response, consciously created from the first day of basic training, to respond almost unthinkingly to the wishes of a military superior can permit no other result.[38]

Thus, the Court of Military Appeals holds that Article 31(a) is identical in scope to the Fifth Amendment, but that the protections of Article 31(b) are broader than those of *United States v. Miranda*.[39] The following discussion analyzes the EE 311 proceedings in light of the case law interpreting Articles 31(a) and (b).

B. Article 31(a) cases

The Court of Military Appeals considered essentially the same position taken by the Navy in the EE 311 investigation in *United States v. Ruiz*.[40] In that case, a court-martial convicted Private Robert J. Ruiz, U.S. Army, of willful disobedience of an order to furnish a urine specimen issued as part of a drug program.[41] Believing that his specimen would test positive, Private Ruiz refused to provide a sample, resulting in his commanding officer ordering him to do so.[42] At trial, the commanding officer testified that he did not intend to use the results of the urinalysis as the basis for a charge at court-martial. He, instead, planned to use a positive urinalysis to initiate proceedings against Private Ruiz for administrative discharge.[43] On appeal, the government argued that Article 31 did not apply because the purpose of the order was not to obtain evidence against the accused for use in a court-martial, but, instead sought evidence for use

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38 United States v. Ravenel, 26 M.J. 344, 349 (C.M.A. 1988). In 1994, the United States Court of Military Appeals was renamed to the United States Court of Appeals for the Armed Forces.

39 384 U.S. 436, 444 (1966); *see also* United States v. Lewis, 12 M.J. 205, 206-7 (C.M.A. 1982).

40 48 C.M.R. 797 (C.M.A. 1974).

41 *Id.*

42 *Id.*

43 *Id.* at 797-98.

in administrative separation proceedings.[44] The Court of Military Appeals began its analysis with the statement that Article 31(a) has a "broader sweep than the Fifth Amendment."[45] The Court of Military Appeals then rejected the government's argument on the following grounds:

> The argument too narrowly restricts the accused's right against self-incrimination under Article 31. Aside from cases in which the order is directed towards producing evidence for actual use against the accused in a criminal proceeding, there are those in which regardless of the order's purpose, the accused knows that compliance will in fact produce incriminating evidence. This is such a case. Here, the accused knew and informed Major Davis that he would not comply with the order because the ensuing urinalysis would prove positive and indicate he had been using drugs. *Thus, despite the Major's purpose in giving the order, the accused was entitled to rely on his Article 31 protections and refuse obedience to it.*[46]

The Court of Military Appeals acknowledged that under Army regulations the results of Private Ruiz's urinalysis could not be used in any disciplinary action under the UCMJ, or as a basis for discharge under other than honorable conditions.[47] It found, however, that "a general (less than honorable) discharge may still be based on the results of a forced urinalysis, thus having a serious effect on the accused's future."[48] In holding the order to provide the urine specimen unlawful, the Court of Military Appeals concluded:

> Moreover, while the purpose of the order was concededly not to obtain evidence against the accused for use at a

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44 *Id.* at 798.

45 *Id.* The Court of Military Appeals cited United States v. Holcomb, 39 C.M.R. 202 (C.M.A. 1969) and United States v. White, 38 C.M.R. 9 (C.M.A. 1967) in support of this statement.

46 *Id.* at 798-99

47 *Id.* at 799.

48 *Id.* at 799.

> court-martial. Major Davis envisioned the use of the test results in an administrative proceeding at which the accused could be subject to a general discharge. [footnote omitted]. The constitutional prohibition applies to administrative as well as criminal proceedings. [citation omitted]. We believe that Article 31(a) has at least equal applicability, for it forbids all persons subject to the Code from compelling another to incriminate himself. None of its terms indicate that Congress intended to permit forced self-incrimination in board proceedings any more than in courts-martial.[49]

In *Giles v. Secretary of the Army*,[50] Antonio A. Giles, Jr., sued the Army seeking to upgrade his general discharge to honorable on the basis of *Ruiz*.[51] While on active duty in the Army, Giles provided urine samples as part of same the drug program involved in *Ruiz* and several of these samples tested positive for illegal drugs.[52] Based on the positive urinalyses, the Army administratively separated Giles for drug abuse and issued him a general discharge.[53] The Army opposed Giles's action on the same basis as in *Ruiz*—that the results of the testing were not for use at court-martial.[54] The Court of Military Appeals found the Army's position without merit on the basis that *Ruiz* disposed of any question regarding Article 31's applicability to administrative proceedings.[55] The Army also argued that an order violating Article 31 does not render the evidence inadmissible in proceedings to punish the servicemember; rather, it simply makes the

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49 *Id.*

50 475 F. Supp 595 (D. D.C. 1979).

51 *Id.* at 596-97.

52 *Id.* at 595-97.

53 *Id.* at 597.

54 *Id.* at 601.

55 *Id.* at 601. In United States v. McFarland, 50 C.M.R. 907 (C.M.A. 1975), the Court of Military Appeals overturned a conviction for disobedience of an order to provide a urine sample on the basis of *Ruiz*.

evidence "judicially unenforceable."[56] Thus, once a servicemember obeys the illegal order, he or she no longer has a remedy for the violation of Article 31.[57] The court rejected this reasoning, holding that "evidence obtained in violation of Article 31 is inadmissible in administrative as well as in court-martial proceedings"[58] The court further opined that it could "not condone in any manner the use by the military of orders held by this Court to be illegal."[59]

Under the *Ruiz* and *Giles* holdings, the NAVINSGEN clearly violated Article 31(a) in ordering of midshipmen to provide incriminating information. The Navy contended, however, that *Ruiz* and *Giles* are no longer valid in light of *United States v. Armstrong*.[60] The issue in *Armstrong* was whether the extraction of a blood specimen violated Article 31(a).[61] The Court of Military Appeals held that Congress did not intend Article 31(a) to go beyond the scope of the Fifth Amendment; a reversal of its statement in *Ruiz*.[62] Consequently, under the "testimonial compulsion" approach used by the Supreme Court, the Court of Military Appeals held that blood specimens are not subject to the self-incrimination safeguards of the Fifth Amendment.[63] Although *Armstrong* limits *Ruiz* and *Giles* with regard to the compulsion of non-testimonial evidence, it does not overrule the proposition that Article 31(a) is independent of the purpose of the questioning, or that statements obtained in violation of Article 31 are inadmissible in administrative proceedings.[64] Hence, *Ruiz* and *Giles* still stand as permissible interpretations of Article 31(a).

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56 *Id.* at 600.

57 *Id.*

58 *Id.* at 600-01.

59 *Id.* at 600 (quoting United States v. Forslund, 27 C.M.R. 82, 83-84 (C.M.A. 1958).

60 9 M.J. 374 (C.M.A. 1980); Memorandum at 33-34.

61 *Armstrong*, 9 M.J. at 375.

62 *Id.* at 381-83.

63 *Id.* at 377, 382-83; *see* Schmerber v. California, 384 U.S. 757, 764 (1966).

64 *See supra* notes 40-59 and accompanying text.

In light of *Armstrong*, it is appropriate, however, to consider whether the Fifth Amendment recognizes the "use" approach utilized in the NAVINSGEN EE 311 inquiry. The analysis of this issue involves inquiry into two areas. First, one must look at the state of mind of the declarant at the time of the incriminating statements. Second, it is necessary to categorize the punishments as either "criminal" or "civil."

The Supreme Court held in *United States v. Kastigar*[65] that an individual can invoke the privilege against self-incrimination in any "proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory."[66] However, *Kastigar* also proclaimed that the privilege only applies to disclosures that the declarant "reasonably believes could be used in a later criminal prosecution or could lead to other evidence that might be so used."[67] Consequently, if the government advises an individual that it will not use his or her statements in a subsequent criminal case, then it may compel testimony from the individual.[68] Conversely, the government may not compel incriminating answers for later be use in a criminal proceeding against the declarant. For example, testimony elicited from an employee at an administrative hearing under a threat of discharge is inadmissible in a subsequent criminal prosecution.[69] Similarly, the government may not discharge an employee for refusing to testify at an administrative hearing when the state threatens to use the testimony in a subsequent criminal prosecution.[70] Likewise, the government may not discharge an employee who refuses to sign a waiver of immunity with respect to the use of his answers in a later criminal prosecution.[71]

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65 406 U.S. 441 (1972).

66 *Id.* at 444.

67 *Id.* at 445; *see* Memorandum at 33.

68 Lefkowitz v. Turley, 414 U.S. 70, 84 (1973).

69 Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

70 Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation of City of New York, 392 U.S. 280, 284-85 (1968).

71 Gardner v. Broderick, 392 U.S. 273, 278-279 (1967).

Under *Kastigar* the focus is not on the intended use of the evidence by the government; rather, it is on the declarant's belief regarding use of the evidence in future criminal proceedings.[72] The NAVINSGEN inquiry cannot pass muster under *Kastigar* because the midshipmen reasonably believed that future criminal action would occur at the time of questioning.[73] Although the NAVINSGEN did label the investigation as "administrative," the investigators did not advise midshipmen that they were immune from future criminal proceedings.[74] In fact, the NAVINSGEN operated under the assumption that some midshipmen could possibly face court-martial.[75] Consequently, in the minds of the midshipmen interviewed, the Navy had every intention of using the information at later punitive proceedings.[76] *Kastigar* is not met simply because the government knows or "assumes" it will not use the compelled information.[77] If this were the case, the government could routinely claim that it did not intend to use compelled statements in a criminal prosecution and, therefore, had no duty to abide by Article 31. No, to avoid the limits of the Fifth Amendment and Article 31(a), the government must advise suspects prior to questioning that they are protected from future criminal action. Since the NAVINSGEN did not provide any type of protection to the midshipmen during the EE 311 inquiry, the Navy cannot rely upon *Kastigar* to justify the absence of protections under Article 31.

The privilege against self-incrimination depends on the nature of the penalties at stake, as well. That is, a penalty that is "civil" in nature will not

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72 *Kastigar*, 406 U.S. at 445.

73 *Id.*

74 *See* Complaint at 22 (midshipmen were told "they had no Article 31 rights because the investigation was 'administrative' in nature").

75 NAVINSGEN Report at 9 ("the possibility of referring especially egregious conduct to courts- martial was not ruled out").

76 *See* Complaint at 23 (several midshipmen alleged that they were threatened with court-martial for asserting their rights under Article 31).

77 *See* NAVINSGEN Report at 9 (NAVINSGEN "assumed that the Superintendent's January 1993 decision not to court-martial identified cheaters would be adhered to in the majority of cases subsequently developed).

trigger the Fifth Amendment's protections against self-incrimination,[78] while a penalty that is sufficiently punitive, i.e.," criminal," will invoke the protections against self-incrimination.[79]

The question whether a particular penalty is civil or criminal is a matter of statutory construction.[80] The court must decide whether Congress, "despite its manifest intention to establish a civil, remedial mechanism, nevertheless provided for sanctions so punitive as to 'transfor[m] . . . a civil remedy into a criminal penalty.'"[81] In *Kennedy v. Mendoza-Martinez*,[82] the Supreme Court described the factors used to determine whether a punishment is criminal:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . .[83]

The sanctions possible for an honor offense include: sixty days restriction; twenty hours of extra duty; one year loss of privileges; one year

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78 United States v. Ward, 448 U.S. 242, 247-48 (1980); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

79 Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956). It is also logical to conclude that a sanction that is not civil for purposes of the Fifth Amendment is criminal under *Kastigar*.

80 *Ward*, 448 U.S. at 248; *see., e.g.*, One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972).

81 *Ward*, 448 U.S. at 249 (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

82 372 U.S. 144 (1963).

83 *Id.* at 168-69.

loss of leave; separation from the Academy for unsatisfactory conduct; and repayment of the cost of the midshipman's education or enlisted service in the fleet.[84] Thus, the type, nature and purpose of the punishments for an honor offense, as well as the condition precedent to an honor violation, i.e., ***scienter***, clearly satisfy the guidelines set forth in *Mendoza-Martinez*.[85] As such, these penalties make the honor proceedings criminal for purposes of the Fifth Amendment.

Even though a penalty may not be sufficiently punitive to trigger all the procedural rights associated with criminal prosecutions, e.g., Sixth Amendment protections, Double Jeopardy Clause of the Fifth Amendment, it may nevertheless be sufficiently criminal to trigger the self-incrimination protections of the Fifth Amendment.[86] This type of sanction is labeled "quasi-criminal."[87] The Supreme Court announced this concept in *Boyd v. United States*[88] as follows:

> [S]uits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for . . . that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . ."[89]

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84 USNAINST 1610.3F ¶ 0411.

85 Clearly, the punishments available at nonjudicial punishment are criminal under the *Mendoza-Martinez* test. *See* 10 U.S.C. § 815 (1994) (Article 15, UCMJ). Administrative discharge proceedings in which an other than honorable characterization is possible also appear to meet the test as a criminal penalty. *See* MILPERSMAN art. 361030; *Giles*, 475 F. Supp. at 602 (court held that "[t]he fact that a general discharge constitutes a penalty cannot be denied").

86 *Id.* at 253.

87 *Id.* at 251.

88 116 U.S. 616 (1886).

89 *Id.* at 634.

Thus, the concept of quasi-criminal proceedings arises from the principle that the Fifth Amendment's guarantee against self-incrimination "is broader in scope than are the guarantees in Art. III and the Sixth Amendment governing trials and criminal prosecutions."[90] The key issue in the *Boyd* line of cases is whether the penalty is so harsh as to require the minimum protection of the Fifth Amendment.[91] The standard used to make this determination is obviously less stringent than the inquiry under *Mendoza-Martinez*.[92] Since the sanctions for an honor violation are criminal under *Mendoza-Martinez* as discussed above, they automatically meet the quasi-criminal criterion under *Boyd*. Consequently, the punishments awardable during honor cases trigger the protections of the Fifth Amendment and Article 31(a) under this basis, as well.[93]

C. Article 31(b) cases

Initially, the military courts interpreted Article 31(b) in a literal manner. In *United States v. Wilson* [94] the Court of Military Appeals concluded that a "person suspected of an offense" must be warned without regard to the purpose or nature of the questioning.[95] In *United States v. Duga*, the Court of Military Appeals modified the "literal interpretation" standard established in *Wilson* in favor of a test focusing on the purpose of the questioning and the perceptions of the accused. Airman First Class

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90 United States v. Regan, 232 U.S. 37, 50 (1914); *see also* Helvering v. Mitchell, 303 U.S. 391, 400 n.3 (1938).

91 In *Boyd*, the Supreme Court found it significant that the statute under scrutiny listed forfeiture, fine and imprisonment as possible punishments. Boyd, 116 U.S. at 634.

92 *See, e.g., Ward* , 448 U.S. at 251.

93 In One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 702 (1964), the Supreme Court applied *Boyd* to a proceeding brought by the State of Pennsylvania to secure the forfeiture of a car allegedly involved in the illegal transportation of liquor. The police illegally seized evidence in violation of the Fourth Amendment, and the Court employed the exclusionary rule at the civil forfeiture proceeding. *See also* United States v. United States Coin and Currency; 401 U.S. 715 (1971) (held the Fifth Amendment applicable to proceedings to secure forfeiture of money found in the possession of a gambler at the time of his arrest).

94 8 C.M.R. 48 (C.M.A. 1953).

95 *Id.* at 54-55.

Duga, U.S. Air Force, appealed his conviction at special court-martial of larceny of a canoe on the grounds that a Sergeant failed to provide him warnings under Article 31.[96] The Sergeant's questioning was not the result of an official investigation, but was part of a casual conversation.[97] The Court of Military Appeals acknowledged that a literal interpretation of Article 31(b) would result in suppression of the statements, "since it is clear that he was a 'person subject to this chapter' interrogating someone 'suspected of an offense.'"[98] Relying upon *United States v. Gibson*,[99] the Court of Military Appeals concluded that Congress did not intend such a literal interpretation of Article 31(b).[100] The Court of Military Appeals reasoned as follows:

> Careful consideration of the history of the requirement of the warning, compels a conclusion that its purpose is to avoid impairment of the constitutional guarantee against compulsory self incrimination. Because of the effect of superior rank or official position upon one subject to military law, the mere asking of a question under certain circumstances is the equivalent of a command. A person subjected to these pressures may rightly be regarded as deprived of his freedom to answer or to remain silent. Under such circumstances, we do not hesitate to reverse convictions whenever the accused has been deprived of the full benefit of the rights granted him by Congress. [citations omitted]. By the same token, however, it is our duty to see to it that such rights are not extended beyond the reasonable intendment of the Code at the expense of substantial justice and on the grounds that are fanciful or unsubstantial.[101]

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96 10 M.J. 206 (C.M.A. 1981).

97 *Id.* at 207.

98 *Id.* at 208 (quoting Article 31(b)).

99 14 C.M.R. 164 (C.M.A. 1954).

100 *Duga*, 10 M.J. at 209.

101 *Id.* at 209 (quoting United States v. Gibson, 14 C.M.R. at 170).

Based on the above reasoning, the Court of Military Appeals held that Article 31(b) "applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry."[102] In order to determine if such pressure exits, the Court of Military Appeals developed a two-part inquiry: (1) whether the questioner was acting in an official capacity or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation.[103]

Under the *Duga* test, the NAVINSGEN investigators clearly had a duty to warn since they were conducting an official investigation in which there was obvious pressure on the midshipmen to respond to questioning.[104] The Navy, however, justified its failure to warn the midshipmen on the basis of *United States v. Anderson*.[105] In that case, the Navy and Marine Corps Court of Military Review (N.M.C.M.R.) stated that "Article 31 warnings are required only when a military accused or suspect is to be interrogated or questioned with an investigatory intent or to elicit incriminating responses in anticipation of criminal prosecution."[106] The problem with *Anderson* is that it does not reflect the standard currently used by the Court of Appeals for the Armed Forces. In *United States v. Loukas*,[107] a general court-martial convicted Airman John G. Loukas, United States Air Force, of wrongful use of cocaine and incapacitation for duty.[108] During a flight from Panama City, Florida to Trinidad, Bolivia, a crewman observed Airman Loukas hallucinating in the cargo hold of the plane. The crew chief asked Airman Loukas if he had taken any drugs and

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102 *Id.* at 210.

103 *Id.*

104 *See* NAVINSGEN Report at 9; *see generally* Supervielle, *supra* note 30 at 198-208.

105 United States v. Anderson, 21 M.J. 751 (N.M.C.M.R. 1985).

106 *Id.* at 757-58.

107 29 M.J. 385 (C.M.A. 1990).

108 *Id.*

he admitted to ingesting cocaine the night before.[109] Airman Loukas appealed claiming that the trial court improperly admitted his unwarned statement.[110] The Court of Military Appeals ruled that the crew chief had no duty to warn Airman Loukas under Article 31(b) because his "inquiry was not a *law-enforcement or disciplinary* investigation."[111]

Loukas broadened the scope of *Anderson* to include all inquiries that seek evidence to punish the servicemember.[112] At the same time, it impliedly rejected the notion that Article 31(b) only applies to inquiries seeking to gather evidence for use in criminal proceedings.[113] Since the primary purpose of the NAVINSGEN investigation was to hold midshipmen accountable through honor proceedings, the NAVINSGEN clearly conducted a "law-enforcement or disciplinary investigation" that required warnings under *Loukas*.[114]

Since *Loukas*, the Court of Military Appeals has applied Article 31(b) to strictly criminal or disciplinary inquiries. For example, in *United States v. Bowerman*,[115] the Court of Military Appeals concluded that an Army pediatrician did not have to give Article 31(b) warnings to an accused when questioning him about injuries to his four-year-old son.[116] In that case, the accused brought his critically injured son to an Army Medical Center. The

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109 *Id.* at 386. The issue certified by the Judge Advocate General of the Air Force to the Court of Military Appeals was whether the "public safety exception" enunciated in New York v. Quarles, 467 U.S. 649 (1984) applied to the case. The Court of Military Appeals determined that it need not address that issue because admission of the challenged testimony was not barred by the Fifth Amendment or Article 31.

110 *Id.*

111 *Id.* at 387.

112 *Id.* at 387-89.

113 *Id.* at 389; *see also* United States v. Fisher, 44 C.M.R. 277 (C.M.A. 1972) (military doctor not performing an investigative or disciplinary function or engaged in perfecting a criminal case, not required to give Article 31(b) warnings to patient).

114 NAVINSGEN Report at 9.

115 39 M.J. 219 (C.M.A. 1994).

116 *Id.* at 221.

supervising pediatrician considered child abuse as a possible cause; however, she believed that there were several other plausible explanations for the injuries not related to abuse by the accused. During her questioning of the accused, she did, however, begin to suspect the accused of abusing the child and terminated the interview. The Court of Military Appeals concluded that Article 31(b) warnings were not required by the doctor because the questioning was for the purpose of medical diagnosis. The court held that even if the doctor thought the child abuse was a 'distinct possibility,' her questioning "to ascertain the facts for protective measures and curative purposes" did not violate Article 31.[117] In *United States v. Guron*,[118] the Air Force Court of Military Review (renamed in 1994 to the Air Force Court of Criminal Appeals) used essentially the same reasoning as in *Bowerman* to hold that a military pay technician did not have to give Article 31(b) warnings to the accused who she questioned concerning his pay.[119] The pay clerk questioned the accused regarding a discrepancy in the residence of the accused's son. The A.F.C.M.R. held that "when accounting and finance personnel interview military members to determine their eligibility for pay and allowances, and not for purposes of disciplinary action or criminal prosecution, no Article 31 warnings need be given. . . ."[120]

The above cases show a trend towards limiting the applicability of Article 31(b). However, the EE 311 inquiry is distinguishable from cases such as *Bowerman* and *Guron*. Article 31(b) did not apply in those cases because the questioning was for a purpose other than disciplinary action. In the EE 311 situation, the questioning occurred as part of an investigation aimed at punishing midshipmen who cheated or lied. Thus, under existing case law, the EE 311 investigation is the type of inquiry that requires Article 31(b) warnings.

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[117] *Id.* at 221-22.

[118] 37 M.J. 942 (A.F.C.M.R. 1993).

[119] *Id.* at 947-48.

[120] *Id.* at 948.

VII. REMEDIES

Congress envisioned two remedies for a violation of Article 31: (1) the exclusion of statements at court-martial under Article 31(d); and (2) punishment of members under Article 98.[121] Article 31(d) provides: "No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial."[122]

At the time of passage of the UCMJ, the idea of warning a suspect of the privilege against self-incrimination was novel.[123] Consequently, Congress focused on when the privilege against self-incrimination should attach and did not consider excluding an unwarned statement from forums other than court-martial.[124] Thus, while the framers of the UCMJ indicated a clear intent to extend the privilege against self-incrimination to all suspects, they provided little guidance concerning the use of unwarned statements outside of the court-martial setting.[125]

VIII. ARTICLE 98

In addition to excluding statements at court-martial, Congress also sought to enforce the provisions of Article 31 by making an intentional violation of the article a crime punishable under Article 98. This intent is evident in the following statement by Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense, regarding the purpose of Article 31:

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121 *Hearings on H.R. 2498*, at 984-85, 988 (statement of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense).

122 10 U.S.C. § 831(d) (1994).

123 *Hearings on H.R. 2498*, at 984-85 (statement of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense).

124 *Id.*

125 *See supra* notes 27-29 and accompanying text.

> Mr. Elston. Of course the section you read [Article of War 24] is much clearer than this section because that makes it very plain that it is before some court.
>
> Mr. Larkin. That is right. But we adopted this format because we put in here as I mentioned the additional necessity of informing the man before you take a statement that insofar as incrimination is concerned it might be used against him.
>
> In (a) we have just reiterated again the right not to incriminate himself.
>
> (b) incidentally, covers a wider scope in that you can't force a man to incriminate himself beforehand—not just on the trial, if you will. And this in addition, since it prohibits any person trying to force a person accused or one suspected, would make it a crime for any officer or any person who tries to force a person to do that.
>
> So not only do we retain the constitutional protections against self-incrimination and this evidentiary protection against degrading unless it is material, but it goes further and provides that if anybody tries to force you to incriminate yourself then he has committed an offense. . . .[126]

The drafters of the UCMJ understood that Article 98 had no equivalent in military or civilian law.[127] They believed, however, that the threat of undue pressure on servicemembers was so severe because of the nature of the military command structure that the threat of criminal prosecution was necessary to protect the effectiveness of Article 31.[128] This intent is evident in the legislative history of both articles and in the

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126 *Hearings on H. R. 2498,* at 988 (statement of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense).

127 *Id.* at 907 (statement of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense).

128 *Id.* at 984, 988 (statement of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense).

severe punishment prescribed for violating Article 98—dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years.[129] Congress, however, mistakenly believed that Article 98 would protect the privilege against self-incrimination. There is no recorded court-martial conviction under Article 98 for "intentionally failing to enforce or comply with" Article 31.[130] The reason for this result is obvious—the very persons who decide to prosecute under this article are the same people who fail to enforce or comply with the provisions of Article 31. That is, the members of the chain of command, including the commanding officer, are responsible for decisions in these situations and are unlikely hold themselves accountable under Article 98. Thus, Article 98 is an ineffectual tool in the effort to ensure that military members comply with Article 31.

IX. CIVIL DAMAGES

Should a military servicemember recover damages from an individual who violates his or her privilege against self-incrimination under the Fifth Amendment and / or Article 31? The Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[131] held that individuals may recover damages against government officials who violate their constitutional rights. However, in *Chappell v. Wallace*[132] the Supreme Court, in a unanimous opinion, ruled that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." The Court reasoned that "special factors counseling hesitation" precluded making the *Bivens* damages remedy available to enlisted members. The "special factors counseling hesitation" included the effects on military discipline and efficiency that would result from making such a remedy available. Specifically, the Court noted the disruption of the "'peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors

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129 MCM, part IV, ¶ 22e.

130 See Supervielle, *supra* note 30, at 193.

131 403 U.S. 388 (1971).

132 462 U.S. 296 (1983).

into court.[133] As a result of *Wallace*, a suit for civil damages is not a viable remedy for a violation of member's privilege against self-incrimination.

Making a civil damages available in the future would prove imprudent. While the threat of civil liability may cause members to comply more readily with Article 31, the harm resulting from the existence of the remedy would substantially outweigh the benefits of increased compliance.[134] As envisioned in *Wallace*, suits by personnel would seriously undermine the authority and effectiveness of superior officers and law enforcement officials; junior personnel would understand that they could force their seniors into court, resulting in the erosion of the actual and apparent authority of the senior personnel.[135] Threats of civil suits would also interfere with the military's need to thoroughly investigate suspected criminal activity by causing investigators to unnecessarily warn individuals and to hesitate in aggressively questioning suspected persons.[136]

X. EXCLUSIONARY RULE

A violation of Article 31, as in the EE 311 case, should preclude the use of the illegally obtained evidence at administrative disciplinary proceedings. The self-incrimination right and the exclusionary remedy are not separable simply because the government seeks to use the illegal evidence at a disciplinary forum less serious than court-martial.[137] If the right against self-incrimination exists, then the exclusionary rule should act as a shield at all disciplinary proceedings.[138] To hold otherwise provides a right with no effective remedy, and furnishes an incentive for the

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133 *Chappell*, 462 U.S. at 301 (quoting Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting)).

134 *See* Alan G. Kaufman, *Constitutional Law-Military Enlisted Personnel May Not Recover Damages from Superiors for Violations of Constitutional Rights.* Chappell v. Wallace, 13 U. Balt. L. Rev. 356 (1984).

135 *Chappell*, 462 U.S. at 296, 299.

136 *See, e.g., id.*

137 *See, e.g., Ruiz*, 48 C.M.R. at 797-99.

138 *See, e.g., Giles*, 475 F. Supp at 597-601.

government to contravene the statutory and constitutional protections afforded to servicemembers.

Investigations in which self-incrimination rights do not apply unquestionably have their place. For example, aircraft and safety mishap investigations are beneficial because they permit the military to determine the cause of serious incidents involving injuries, death or damage to government property.[139] Because servicemembers do not have the right to remain silent in these inquiries, the responsible command is more capable of obtaining the truth.[140] This permits the military to take steps to correct deficiencies in equipment, training or procedures in order to prevent a recurrence of the incident under investigation. However, once an investigation takes on a disciplinary aspect, the particular goals or purpose of the inquiry must take a back seat to the self-incrimination rights of servicemembers. Thus, in many cases the military must weigh its desire to know the whole truth against the goal of punishing the individuals responsible. If the military decides that the latter is more important, then it must live with the consequences of that decision—that suspected members will have the right against self-incrimination when questioned. The military cannot simply ignore that the right exists.[141]

The NAVINSGEN inquiry illustrates this point. The NAVINSGEN's tasking was to "conduct an investigation into the application of the honor system and the integrity of the examination process at the U.S. Naval Academy with respect to . . . Electrical Engineering (EE 311)."[142] The goal of this inquiry was attainable without using compelled evidence to discipline midshipmen. The Navy had the option of requiring midshipmen to divulge information, but not using the information to punish midshipmen; much like a mishap investigation.[143] The facts gathered during this sort of inquiry would enable the Navy to accomplish its goal of assessing the honor system

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139 *See* Chief of Naval Operations Instruction 3750.6Q ¶¶ 602, 606 (Aug. 28, 1989) [hereinafter OPNAVINST 3750.6Q]; Chief of Naval Operations Instruction 5102.1C ¶ 204 (Mar. 3, 1989) [hereinafter OPNAVINST 5102.1C].

140 *See* OPNAVINST 3750.6Q at ¶606.

141 *Id.*

142 NAVINSGEN Report at 1.

143 *See* OPNAVINST 3750.6Q at ¶606.

and exam process at the Academy. In selecting this option, the Navy had to recognize that it was forfeiting the ability to punish midshipmen based on the compelled evidence. If the Navy believed, however, that disciplining midshipmen was its primary objective, then it had to accept that its evidence gathering capabilities would be hindered by Article 31.

XI. FAIRNESS CONSIDERATIONS

Another approach to the issues raised above is to simply ask, "Were the procedures used fair to the midshipmen?" The problem with analyzing Article 31 using the traditional administrative-criminal line of demarcation is that such an approach does not take into account the unique aspects of the military or its justice system. The United States Attorney's claim that Article 31 did not attach because "the Fifth Amendment, of course, only applies only upon a reasonable belief that statements could be used in a criminal proceeding" does not take into account that the military operates under a system wholly different than any other in our society.[144] The purpose of military law is to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[145] Because of the emphasis on discipline in the military justice scheme, there are several administrative avenues down which alleged misconduct can travel. Every one of these proceedings has serious consequences for the service member unparalleled in civilian systems. For example, a midshipman's alleged violation of the UCMJ may end up at summary court-martial, special court-martial, general court-martial, nonjudicial punishment, the Academy conduct system, the Academy honor system or administrative discharge proceedings.[146] At administrative proceedings, a midshipman faces sanctions, such as: restriction; extra duty; fines and forfeitures; repayment of educational costs;

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144 *See* Memorandum at 33.

145 MCM, pt. I, ¶ 3.

146 *See* 10 U.S.C. §§ 17-20 (1994) (Articles 17-20, UCMJ); *see also supra* notes 84-85 and accompanying text.

reduction in rate; and discharge under other than honorable conditions.[147] These potential penalties require protection of servicemember's self-incrimination rights in a manner much broader than in civilian administrative proceedings.

Congress recognizes the disciplinary aspect of military law and the inherent pressure on servicemembers to reply to inquiries by their superiors.[148] This is reflected in the structure of Article 31.[149] The services traditionally appreciate these factors, as well. For example, injured servicemembers have the right to remain silent—and must be advised of that right—in line of duty / misconduct investigations.[150] Additionally, the services provide significant procedural protections to members appearing at administrative hearings. Thus, servicemembers have the right to remain silent at nonjudicial punishment and administrative separation proceedings.[151] Likewise, midshipmen may remain silent at honor hearings.[152] The fairness considerations reflected in these protections surely exist in administrative investigations, such as the NAVINSGEN EE 311 inquiry, as well.

XII. IMPLICATIONS OF THE NAVINSGEN EE 311 INVESTIGATION

The long-term ramifications of the NAVINSGEN investigation are significant, indeed. The danger posed by such inquiries is that the military will institutionalize the approach used by the Navy in the EE 311 investigation. There is already evidence of this trend. For example, the Department of Defense Inspector General investigators in the Tailhook

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147 *See supra* notes 85-86 and accompanying text; MILPERSMAN, art. 3640415. Educational repayment cost for a midshipman first class is estimated at $80,000.00. *See Academy Plans to Expel Twenty-Four in Cheating Case*, The Virginian-Pilot, Apr. 29, 1994, at A2.

148 *See supra* notes 27-37 and accompanying text..

149 *Id.*

150 Manual of the Judge Advocate General, ch. II, pt. A, ¶ 0215b (1992).

151 MCM, pt. V; MILPERSMAN, art. 3640350, ¶ 4a(3).

152 USNAINST 1610.3F ¶ 0303.

inquiry used the same "administrative inquiry" justification.[153] Acceptance of such procedures is also found in the current Naval Academy honor instruction:

> . . . a midshipman accused of an honor offense shall have the right to remain silent without anyone drawing any adverse inference from his or her silence. . . . The right to remain silent does not prevent competent authorities from requiring a midshipman to answer questions specifically, directly, and narrowly relating to the performance of official duties. For example, even if a Taps inspector was suspected of lying by submitting a false muster, competent authority could ask whether another midshipman was actually present, as such information is necessary to maintain accountability.[154]

The instruction goes on to explain:

> Brigade Honor Boards shall not consider a confession or admission obtained by unlawful coercion or inducement likely to affect its truthfulness. Not advising a midshipmen of all rights under Article 31, UCMJ, the Fifth Amendment to the United States Constitution, or those rights granted under these procedures before a confession or admission is made, does not prevent acceptance of the confession or evidence [at the honor board].[155]

Thus, the honor instruction contravenes Article 31 in two regards. First, the instruction violates Article 31(a) in that it permits compulsion of certain types of incriminating testimony at disciplinary honor hearings. Second, it allows the introduction to statements at honor hearings obtained in direct violation of Article 31(b).

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153 *See* Hays Parks, *Tailhook, What Happened, Why & What's to be Learned,* Proceedings 89, 98 (Sep. 1994); Rowan Scarbrough, *Morale Shot Down by Tailhook Probe: Fliers Humiliated by Sex Questions,* The Washington Times, Mar. 22, 1993, at A1, col. 1.

154 USNAINST 1610.3F ¶ 0303b.

155 *Id.* at § 0503c(1).

The most serious consequence of the NAVINSGEN EE 311 inquiry is its potential effect on military investigations, in general. The possibility of commands using the same methods as professional investigating agencies, such as the NAVINSGEN, is very real. Investigators, observers, and the midshipmen themselves, may come to think that the procedures employed by the NAVINSGEN personnel are legitimate and appropriate practices. If the rest of the military adopts these techniques, then the protection against self-incrimination in investigations preceding nonjudicial punishment and administrative separation proceedings may very well cease to exist.[156] Such a prediction may seem extreme, but consider the following warning by the Supreme Court:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of the person and property should be liberally construed.[157]

Ignoring the due process protections of servicemembers may accomplish the short-term goals of a particular investigation; however, the long-range consequences are much more significant. Conducting an investigation without concern for traditional procedural safeguards disillusions and embitters servicemembers.[158] Such methods also undermine the confidence of servicemembers and the public in the military's ability to fairly and thoroughly investigate incidents.[159] Furthermore, forces outside the military will come to expect the military to conduct investigations in the same manner as in the Tailhook and NAVINSGEN EE 311 inquiries. When the services provide criminal procedural protections in a high-profile inquiry in the future, these forces will likely claim over-

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156 *See supra* notes 139-41 and accompanying text.

157 *Boyd*, 116 U.S. at 535.

158 *See* Caplan, *supra* note 10, at 33; Scarbrough, *supra* note 153, at A1, col. 1.

159 *Id.*

protection or cover-up on the part of the of the military.[160] If the military accepts the methods used in the NAVINSGEN EE 311 inquiry as legitimate, then the negative repercussions described above will continue. Therefore, the services should reject the administrative-criminal distinction in all investigations that have a disciplinary purpose.

XIII. CONCLUSION

The Navy violated the Article 31 rights of midshipmen in the NAVINSGEN EE 311 investigation. That the inquiry was administrative in nature did not justify the failure to provide Article 31 protections. The statutory language and legislative history the statute, as well as the relevant case law and policy considerations, all support this conclusion. These same factors also dictate that Article 31 should apply in the broadest possible manner to all proceedings with a disciplinary character.

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[160] See Caplan, *supra* note 10, at 33 (even though Navy did not provide self-incrimination protections in the NAVINSGEN investigation, article criticized the Navy for letting cheaters go free).

FEDERAL ACQUISITION LAW IN AN ERA OF DECLINING DEFENSE SPENDING: DEFINING THE GOVERNMENT'S INTEREST IN DEFENSE CONTRACTOR PROPERTY

Brett W. King *

I. INTRODUCTION

The defense industry is currently experiencing one of the largest reductions of capacity in peacetime history.[1] One senior Pentagon official has predicted that ultimately the defense industrial base will be a mere one third of the size that it was in the mid-1980s.[2] Despite the fact that the defense industry in 1994 dismissed its one millionth employee as it attempted to adjust to dramatic reductions in government appropriations, it has been estimated that there continues to exist at least two thirds more defense production capacity today then the industry will need in the coming years.[3] Currently, the prevailing view among defense analysts and industry

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1 See, e.g., Bernard Gray, *Fewer Bangs For Less Bucks: The US Defense Industry Is Restructuring In Response To Deep Cuts In Weapons Procurement,* Financial Times, Aug. 13, 1994, at 13 (In the past decade the U.S. defense budget has been cut by one third in real terms from $401 billion to $269 billion, and the number of military personnel will fall by half a million, from 2 million in 1985 to 1.5 million by 1997). *See also,* Andy Pastor, *Pentagon Plans Call for Big Cuts into Late 1990s,* Wall St. J., Apr. 16, 1990, at A3, col. 1.

2 Ricks and Davidson, *Defense-Industry Mergers Will Get Pentagon Support,* Wall St. J., Sept. 1, 1993, at A16, col. 2 (Comments of William Perry, deputy defense secretary).

3 DOD Policy on Defense Company Mergers: Hearings Before the Subcommittee on Oversight and Investigations, Committee on Armed Services, House of Representatives, 103rd Cong., 2nd Sess. (July 27, 1994) (statement of Norman R. Augustine, Chairman and CEO, Martin Marietta Corp.) (noting also that DoD has estimated that future defense budgets can support at most two of the five current satellite manufacturers, four of the eight tactical missile makers and only two of the current five rocket motor companies).

officials is that only the strongest and most efficient companies will be able to survive this post-cold war downsizing and continue to do business into the next decade.[4] This belief has spawned, and is expected to further promote, the recent wave of large defense mergers and acquisitions which has, in turn, focused considerable public and media attention on the strongest industry players and their various consolidation and diversification strategies for dealing with the new realities of future defense spending.[5]

However, once this wave of corporate consolidations has been completed, a residual pool of firms, unable to achieve the economies of scale of the new defense conglomerates, might face uncertain business prospects and may be unable to find financially secure partners. Although currently given little attention in the press, the next phase of the defense industry's downsizing may well involve the weakest firms in the industry facing the prospect of bankruptcy, reorganization, or possibly even liquidation.

Even in the best of times, the filing of a bankruptcy petition by a defense contractor severely restricts the ability of the Department of Defense

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4 See AFX News, *Company News; Mergers and Acquisitions,* Aug. 31, 1994 (comments by George Podrasky, an analyst at Duff & Phelps, stating that "size is crucial to survival" in the future defense industry). *See also,* Phillip Finnegan, *Lockheed Martin May Point Way to Survival,* Defense News, Sept. 5, 1994, at 4 (noting that increased size is important in the future defense industry); Kenneth Gilpin, *For Military Contractors, It's Buy or Be Bought,* N.Y. Times, Mar. 12, 1994, at 35, Sec. 1. *See generally,* William Kovacic, *Merger Policy In Declining Defense Industry,* 36 Antitrust Bulletin 543, 547-48 (1991).

5 See Kenneth Gilpin, *Reshaping the Arms Industry,* N.Y. Times, Aug. 31, 1994, at 5, Sec. D (discussing future strategies of the defense industry); Jeff Cole *Merger of Lockheed and Martin Marietta Pushes Industry Trend,* Wall St. J., Aug. 30, 1994, at A1, col. 6 (noting that the largest defense contractors are themselves consolidating in the face of increased competition and other pressures in the defense industry, and that further consolidations are likely in the future); Philip Finnegan, *Smaller Firms To Join Merger Wave,* Defense News, July 18, 1994, at 2 (noting that while many large U.S. firms remain in the market for new acquisitions, the consolidations that have reshaped large defense companies are likely to spur increased activity among smaller companies as the pressure from defense budget cuts increases); *Issues Related to Acquisition and Merger Restructuring Costs: Hearings Before the Subcommittee on Oversight and Investigations, Committee on Armed Services, House of Representatives,* 103rd Cong., 2nd Sess. (July 27, 1994) (statement of David E. Cooper, Director, Acquisition Policy, Technology, and Competitiveness Issues, National Security and International Affairs Division, Dept. of Defense) (noting the acceleration of defense industry merger and acquisition activity in 1994).

(DOD) to effectively manage a procurement program.[6] Indeed, the bankruptcy code[7] and government contracting and procurement laws and regulations[8] have been described as "two inclusive, exclusive, sweeping schemes,"[9] whose interplay of often conflicting policy goals[10] can easily lead to problems and uncertainty unless there has been "careful legislative coordination" between these two legal and administrative processes.[11] Unfortunately, such a coordination has not taken place, making the current legal interaction of these two schemes confused and often times contradictory.

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6 See Scott E. Ransick, *Adverse Impact of the Federal Bankruptcy Law on the Government's Rights in Relation to the Contractor in Default,* 124 Mil. L. Rev. 65, 73 (1989) (upon the filing for bankruptcy by a defense contractor, "[l]engthy delays, funding problems, and protected litigation in a strange forum are but a few of the possible difficulties" to be faced by the government).

7 The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1988, Supp. III 1991, & 1994) (hereinafter as the "Bankruptcy Code" or the "Code").

8 The laws dealing with federal contract acquisitions are lengthy, complex, and embedded in a variety of legislative and administrative codes. *See, e.g.,* Federal Acquisition Regulations, 48 CFR (1992); Federal Procurement Regulations, 41 C.F.R. § 1-49 (1984); Defense Procurement Regulations 32 C.F.R. 1-600 to 1-610 (1984); Anti-Deficiency Act of 1905, 31 U.S.C. § 1350 (1988); The Contract Disputes Act of 1978, 41. U.S.C. 601-13 (1988) (herein generally as the "Federal Acquisition Laws" or "Acquisition Laws").

9 *Gary Aircraft Corp. v. United States (In re Gary Aircraft Corp.),* 698 F.2d 775, 780 (5th Cir. 1983).

10 The primary goal of the Bankruptcy Code under Chapter 11 is the rehabilitation of the debtor, while under Chapter 7 the Code aims at an orderly and equitable distribution of the debtor's assets. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179-80. *See also,* Raymond T. Nimmer, *Executory Contracts in Bankruptcy; Protecting the Fundamental Terms of the Bargain,* 54 U. Colo. L. Rev. 507, 509 (1983) (the basic premise of Chapter 11 is to provide the debtor with a "fresh start"). *See also infra* note 82.

11 Ransick, *supra* note 6, at 65.

As in any type bankruptcy proceeding, DOD, as a nondebtor third party,[12] faces two critical issues; the disposition of the assets which are in the possession of the bankrupt estate and the viability of any contracts with the bankrupt entity. The first issue, which is a subject of this article, is controlled by both contractual language and Federal Acquisition Laws. Currently, a split in the interpretation of the Acquisition Laws by various federal courts has made it difficult to determine the exact nature of the government's interest in such assets. This paper will analyze the history of this issue and will recommend an alternative solution in light of the policies and goals of the Bankruptcy Code.

The second issue faced by DOD in contractor bankruptcies, concerns the continued viability of outstanding contracts DOD may have with a bankrupt entity. A considerable change of control occurs with a contract which is part of the bankruptcy process. Once a contractor files for bankruptcy protection, the disposition of contracts will be controlled almost exclusively by the Bankruptcy Code, and not, as had previously been the case, by the terms and conditions of the contract itself or the Federal Acquisition Laws.[13] Unfortunately, conflicting judicial interpretations over that portion of the Bankruptcy Code governing the disposition of contracts[14] has, over the last 15 years, made it difficult to predict whether performance under a defense contract will continue after a bankruptcy filing. Although a complete analysis of this issue is beyond the scope of this paper,[15] it remains an important area of concern for DOD in the event of a contractor bankruptcy and deserves attention as an issue whose importance may grow in the future as an increasing number of defense contractors face the prospects of either reorganization or liquidation.[16]

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12 The term "nondebtor third party" is used to indicate parties other than the debtor, debtor in possession, or trustee.

13 See Harris Products, Inc., ASBCA No. 30426, 87-2 BCA ¶ 19,807.

14 Bankruptcy Code at §§ 365(c)(1) and 365(f).

15 For a discussion of the interpretive problems of § 365(c)(1) of the Code see Ransick, *supra* note 6.

16 A relatively large number of reported bankruptcy cases dealing with § 365(c)(1) assumption or assignment issues involve military contractors. *See, e.g., In re American Ship Building Co., Inc.*, 164 B.R. 358 (1994) (debtor in possession allowed to assume a contract with the U.S. Navy to build navel vessels); *In re Plum Run*

II. THE DISPOSITION OF ASSETS UPON CANCELLATION OR LIQUIDATION: OWNERSHIP OR SECURITY INTEREST?

When a firm with which DOD has an outstanding procurement or other contract files for protection under Chapter 11 of the Bankruptcy Code,[17] the management of the firm, or in some unusual cases an appointed trustee, continues the operations of the bankrupt entity and generally keeps possession of all property within its control, such as inventory, machinery, material . . . etc. However, in the event a firm is unable or unwilling to continue operations and enters liquidation proceedings under Chapter 7, or the contract is otherwise terminated prior to completion,[18] then DOD must address the problem of the disposition of

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Service Corp., 159 B.R. 496, 500 (S.D. Oh. 1993) (debtor in possession not allowed to assume a base operational support contract with the Navy); *In re Fastrax, Inc.*, 129 B.R. 274 (Bankr. M.D. Fla. 1991) (debtor in possession allowed to assume a subcontract in connection with work for the U.S. Air Force); *Department of Air Force v. Carolina Parachute*, 907 F.2 1469 (4th Cir. 1990) (assumption issues involving bankrupt supplier of parachutes); *In re Ontario Locomotive & Indus. Ry. Supplies, Inc.*, 126 B.R. 146 (Bankr. W.D. N.Y. 1990) (debtor in possession allowed to assume a contract to remanufacture three U.S. Navy locomotives); *Secretary of the Army v. Terrace Apartments (In re Terrace Apartments)*, 107 B.R. 382, 383 (Bankr. N.D. Ga. 1989) (debtor in possession allowed to assume a sweetheart lease for real property against the wishes of the U.S. Army); *In re West Electronics*, 852 F.2d 79 (3rd Cir. 1988) (debtor in possession not allowed to assume a contract to produce parts for the AIM-9 missile launcher).

17 The Bankruptcy Code is divided into eight major chapters. Chapters 1, 3, and 5 are administrative and procedural. Each of the five substantive operational chapters address specific bankruptcy debtors or outcomes; these are Chapter 7 (general liquidations), Chapter 9 (municipal debt adjustment), Chapter 11 (general reorganizations), Chapter 12 (family farmer debt adjustment) and Chapter 13 (individual debt adjustment).

18 A government contract may be discontinued for a number of reasons. The contract may be rejected by the debtor in possession in a Chapter 11 proceeding, or the contractor may liquidate under Chapter 7, in which case the contract will be terminated if the trustee is unable to assign the contract to a third party. This may be a result of either the inability of the trustee to find a willing third party assignee or the government's refusal to consent to the assignment when such consent is required by the applicable jurisdiction under the Anti-Assignment Act 41 U.S.C. § 15. Additionally, DOD may cancel the contract for any number of reasons, or the contractor may simply default.

the physical assets used in connection with the contract[19] and the recovery of unliquidated monetary damages.[20]

Historically, most government contracts that include periodic progress payments as a partial financing scheme also include within their terms a provision that actual title to all materials used in connection with the contract vests in the government.[21] This means that, technically speaking, materials such as tools and inventory being used to assemble a tank are the property of the U.S. Government, and are merely in the possession of, and being used by, the contractor. This title vesting provision has always been

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19 The dispute basically appears to involve only money damages, since it seems to be "indisputable" that physical possession of contractor inventory falls only to the government. *Marine Midland Bank v. United States,* 687 F.2d 395, 398 (1982) *cert. denied,* 460 U.S. 1037 (1983). *See also, United States v. Ansonia Brass & Copper Co.,* 218 U.S. 452, 471 (1910). ("It is also indisputable that the government's taking of possession places the collateral beyond the reach of any interested parties. [Government] property, for the most obvious reasons of public policy, cannot be seized by authority of another sovereignty against the consent of the Government."); *United States v. Digital Prod. Corp.,* 624 F.2d 690 (5th Cir. 1980) (Especially when defense procurement is involved, the government's title vesting provisions operate to prevent the actual possession of goods contracted for by the government from passing to anyone else). *See generally, In re American Boiler Works, Inc.,* 220 F.2d 319 (3d Cir. 1955) (The dispute over compensation would arise when the government took possession of the property and thereby extinguished a valid lien); *Armstrong v. United States,* 364 U.S. 40 (1960) (where the government takes title to property on which a valid lien exists, the lien is extinguished and its value is recoverable in an action for taking).

20 Under the Bankruptcy Code, the bankruptcy court normally has jurisdiction to supervise the disposition of claims. *See, Nathanson v. N.L.R.B.,* 344 U.S. 565 (1947); *In re Continental Airlines Corp.,* 64 B.R. 882, 886 (Bankr. S.D. Tex. 1986). Certain claims, however, may be litigated under the Contracts Disputes Act of 1978, *supra* note 8, and jurisdiction will fall to the court of claims. This is a jurisdictional question beyond the scope of this article, however, it has been noted that, in general, the court of claims is probably less interested in rehabilitating a bankrupt party and more experienced in dealing with government contracts than is the bankruptcy court. *See* Ransick, *supra* note 6 at 107.

21 32 C.F.R. § 163.79-2 (1981) provides that upon the government's making of progress payments, title shall "forthwith vest" in the government "to all parts; materials; inventories; work in progress . . . theretofore acquired or produced by the Contractor and allocated or property chargeable to this contract under sound and generally accepted accounting principles and practices . . . [and] to all like property thereafter acquired or produced by the Contractor as aforesaid . . . upon said acquisition, production or allocation." For the definition of, and distinction between, progress payments and advance payments, *see infra* note 53.

somewhat of a legal fiction, however, in that the Government never seems to actually "own" much of the property to which it claims title.[22] For example, when the contractor first assigns the use of or purchases a screwdriver for a tank assembly line, the ownership of that screwdriver vests in the government. Once the tank is delivered and the contract is deemed completed, ownership of the screwdriver reverts back to the contractor, who is free to keep the screwdriver, sell it and pocket the proceeds, or simply throw it away.

Because of this perceived lack of true ownership,[23] some courts have recently held that in fact, the government holds no more than a secured interest in contractor materials and equipment, such as a screwdriver.[24] Other courts have continued to support the traditional "title" position, and for the last twelve years a debate concerning the exact nature of the interest the government possesses in materials used in government contract work has continued. Because most of the cases involved are military procurement contracts,[25] this dispute is of a special interest to

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22 "Title" generally refers to situations in which a party hold full rights of ownership, where as a "lien" has been defined as "a claim, encumbrance, or charge on property for payment of some debt, obligation or duty." *See* Blacks Law Dictionary, 922 (6th ed. 1990).

23 *Marine Midland, supra* note 19 at 393-404. Generally, in contract law, language which purports to place title to goods in a party who is not in possession of the goods nor possesses other aspects of ownership (e.g., risk of loss, control over final disposition . . . etc.) in the goods may well be found only to have a lien interest in the goods, despite the use of the word "title." *See In re Wincom Corp.,* 76 B.R. 1, 5 (Bankr. D. Mass 1987); *American Pouch Foods, infra* note 25 at 1193.

24 *Marine Midland, supra* note 19.

25 A disproportional large number of title vesting disputes involve military contractors, both in an out of bankruptcy. *See, e.g., Skip Kirchdorfer, Inc., v. United States,* 6 F.3d 1573 (5th Cir. 1993) (subcontractor for construction of military base housing at Guantanamo Bay); *United States v. Pearson's E. F. & C., Inc.,* 771 F. Supp 810 (1990) (Navy subcontractor of pontoons); *In re Wincom Corp.,* 76 B.R. 1 (Bankr. D. Mass.1987) (bankrupt Navy contractor of submarine antennae); *First National Bank of Geneva v. Billas (In re Denalco Corp.),* 51 B.R. 77 (Bankr. N.D. Ill. 1985), *rev'd,* 57 B.R. 392 (1986), *reheard sub nom, First National Bank of Geneva v. United States,* 13 Cl.Ct. 385 (1987) (bankrupt Army contractor of gasoline cylinder heads); *Welco Indus. v. United States,* 8 Cl. Ct. 303 (1985), *aff'd mem.* 790 F.2d 90 (Fed. Cir. 1986) (subcontractor on Army Troop Support Command air conditioner supply contract); *United States v. Economy Cab and Tool Co. Inc. (In re Economy Cab and Tool Co., Inc.),* 47 B.R. 708 (Bankr. D. Minn.1984) (bankrupt Army contractor of

DOD. Because title vested assets often represent the last remaining residual value of the bankrupt estate, disputes over ownership interests are often contentious affairs. Not surprisingly, this conflict has been called "[o]ne of the most bitterly disputed issues involving government procurement and bankruptcy."[26]

III. TITTLE VS. LIEN THEORY: A HISTORY OF FICTIONAL OWNERSHIP

Under a federal statute adopted in 1823, the government was strictly prohibited from advancing public money or making payments on contracts in excess of the value of services rendered or goods delivered.[27] While this statute initially appeared to prohibit the advancing of public funds to contractors, the concept of progress payments was developed whereby the government would obtain title to the goods as the production of material was continuing, up to the value of the monies advanced.[28] This allowed an effective circumvention of the prohibition of advanced funds that the

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aircraft maintenance platforms); *In re American Pouch Foods, Inc.*, 30 B.R. 1015 (Bankr. N.D. Ill. 1983) ("APF") (bankrupt manufacture of Meals, Ready to Eat), *aff'd,* 769 F.2d 1190 (7th Cir.1985), *cert. denied,* 475 U.S. 1082, (1986); *Verco Ind. v. United States (In re Verco Ind.)* 27 B.R. 615 (Bankr. 9th Cir. 1982) (manufacturer of various types of military equipment for numerous defense agencies); *Marine Midland Bank v. United States,* 687 F.2d 395 (1982) (Defense contractor engaged in the production of munitions trailers for the Air Force and Navy) *cert. denied,* 460 U.S. 1037 (1983).

26 Ransick, *supra* note 6 at 92.

27 3 Stat. 723, Pub. L. No. 17-9 (1823), 31 U.S.C. § 529 (1981), 31 U.S.C. § 3324 (1983). ("No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law.") (herein the "1823 Statute").

28 For government contractors, the initial result from the 1823 Statute was a prohibition on most types of advance or progress payments made to contractors before a contract's full completion. A way to circumvent this restriction became necessary if such payments were to be made, as difficult procurement projects increasingly seemed to require. The government's title vesting scheme was developed as the answer. It conditioned progress payments on the vesting of title, on the theory that there was no "advance" of public money if the government took something of value for its payments. It was important that this system construe the government's vesting of title literally, in order to make progress payments look like partial purchases and thus consistent with the text of the 1823 Statute. *See Marine Midland, supra* note 19 at 400, *APF, supra* note 25 at 1020.

early nineteenth century statute represented. While this practice was criticized by some,[29] it was generally supported by government legal authorities[30] and was widely used until it was superseded by the Defense Contract Financing Regulations in 1956,[31] which were codified in 1958 and specifically allowed for progress payments.[32]

The Supreme Court on a number of occasions has upheld the concept of title vesting. In the leading case to address the issue, the Court stated that: "[I]t is . . . well settled that if the contract is such to clearly

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29 *See* C. S. McClelland, *The Illegality of Progress Payments as a Means of Financing Government Contractors,* 33 Notre Dame Law. 380 (1958) (analyzing the history of the progress payments scheme and concluding it is inconsistent with the 1823 Statute).

30 Under the "equivalent benefit theory," the 1823 Statute's prohibition on advances of government funds was found not to bar payments for work in progress when the amount of the payment was earned by the contractor. 18 Op. Atty. Gen. 105 (1885). This position was ultimately adopted by the Comptroller General and came into full acceptance. 17 Comp. Dec. 894 (1911); 1 Comp. Gen. 143 (1921); 20 Comptr. Gen. 917 (1941). *See APF, supra* note 25 at 1192-94.

31 32 C.F.R. Part 82; 32 CFR Part 163; 22 Fed. Reg. 815, (February 9, 1957). The goal of the system, as stated in a subsection entitled "Basic Policies" is "(t)he providing of funds for payment of expenses of performance of contracts (as) an essential element of defense production." § 163.18. Further, it was recognized that "[p]rudent contract financing supports procurement and production by providing necessary funds to supplement other funds available to contractors for contract performance." *Id.* Recognizing the risks inherent in loaning money, however, the regulations provide that such financing must be designed to minimize monetary loss to the government. § 163.19. Progress payments and advance payments are granted only in a set order of preference, all of which succeed private financing on reasonable terms. § 163.22. Financing is not allowed at all unless the contractor is determined to be credit worthy. §§ 163.24 and 163.27. Financing through progress payments is conditioned on use of the title vesting clause in the procurement contract. § 163.79. "Title" to a contractor's inventory is taken by the government to secure the advance of progress payments, which the contractor repays by having the sum of the progress payments deducted from amounts due upon final performance. §§ 163.81 and 163.81-3.

32 Pub. L. No. 85-800 § 9, 72 Stat. 967, August 28, 1958 (codified as 10 U.S.C. § 2307 (1982)) 10 U.S.C. 2307(a)(1) and (c) (the "1958 Amendments"). This Act was the culmination of the formal adoption of this concept. Exceptions earlier had been adopted in the Armed Services Procurement Act of 1947, Pub. L. No. 80-65, 62 Stat. 21., covering military contracts. This was followed one year later with a similar provision for nonmilitary procurement, Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-288, 63 Stat. 377 (1949).

express the intention of the parties that the builder shall sell and the purchaser shall buy the ship before its completion, and at the different stages of its progress, and this purpose is expressed in the words of the contract, it is binding and effectual to pass the title."[33] Most lower courts that have had occasion to address this issue have also supported the granting of title in instances where the contract so provided.[34] It would seem that this question was well settled.

However, in spite of the case law and the plain text of the contractual provisions which purport to grant title to the government, the reality of usage did not quite seem to fulfill the usual characteristics of actual ownership that title envisions. This result arose out of the terms of the standard procurement contracts and the Federal Acquisition Regulations which made it appear that the contractor was in reality the true owner of the materials, and the government was merely a lien holder until the goods were actually delivered.[35] In a sense, the government was receiving what in

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33 *United States v. Ansonia Brass & Copper, Co.,* 218 U.S. 452 (1910) (holding that the title vesting clause gave the Government actual, partial ownership of a ship under construction, and not merely a lien). *See also City of Detroit v. Murray Corp.,* 355 U.S. 489, 524, (1958) (Whittaker, J. dissenting on other grounds) ("the contracts in question conveyed full beneficial title—all elements of title and incidents of ownership - in the materials to the Government.").

34 *See generally, In re Murdock Machine & Eng. Co. of Utah,* 620 F.2d 767 (10th Cir. 1980); *United States v. Digital Products Corp.,* 624 F.2d 690 (5th Cir. 1980); *In re Double H Products,* 462 F.2d 52 (3d Cir. 1972); *Shepard Engineering Co. v. United States,* 287 F.2d 737 (8th Cir. 1961); *In re American Boiler Works,* 220 F.2d 319 (3rd Cir. 1955); *In re Greenstreet, Inc.,* 209 F.2d 660 (7th Cir. 1954); *In re Read-York,* 152 F.2d 313 (7th Cir. 1945); *United States v. Matadure Corporation,* CV 80-0460, slip op. (E.D.N.Y. April 17, 1980); *United States v. Buder,* 414 F.Supp. 1 (E.D.Mo. 1975) *aff'd* 538 F.2d 333 (8th Cir. 1976); *United States v. Amaco Electronic Corporation,* 224 F.Supp. 783 (E.D.N.Y. 1963); *Boeing Co. v. United States,* 168 Ct. Cl. 109, 338 F.2d 342 (1964), *cert. den.* 380 U.S. 972 (1965). For the one somewhat unique case that did not follow this line of reasoning, *see infra* note 37.

35 Provisions in title vesting clause typically require some or all of the following: (1) that title to certain property will vest in the Government both before and after payments are made; (2) that title transfer will not affect the handling and disposition of covered property under other sections of the contract; (3) that surplus items will revest in the contractor upon completion of the contract; (4) that production scrap may be sold without the government's approval; (5) that the contractor retain possession of the material; (6) that the contractor shall replace qualitatively defective "title vested" property at its own expense; (7) that the contractor bares all risk of loss unless expressly assumed by the government; (8) the government accepts no inventory-related liability for the covered inventory; and (9) that the custodial regulations

other contexts was clearly a lien, but for purposes of conforming to the 1823 Statute and subsequently developed law, was deemed to be full ownership in the form of title to the property. This discrepancy did not escape the notice of parties wishing to succeed to the Government's interest. When actually litigated, the courts viewed the issue as minor and generally found that the title approach was valid, despite certain inconsistencies with the widely accepted distinctions between it and a lien. As one court found:

> Contentions such as these [that the "title vesting" clause actually creates a lien] have frequently been advanced over the years in attempts to escape the effect of the title-passing provisions of fixed-price Government contract partial [progress] payment clauses. At least to the extent of the partial [progress] payments, the courts have, in a variety of situations, almost unanimously sustained the provision as effecting a full and complete passage of title or ownership, and as not creating only a lien or security interest.[36]

Notwithstanding this established historical and legislative background, in 1982 a court found that despite the use of the word title in both the contract in question and Acquisition Laws, the government in fact held only a lien in the interested property.[37] The case involved a bank who

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usually applicable to the handling of Government property in the possession of contractors are not applicable to title vested property. 32 C.F.R. 163.80. *See also Detroit v. Murry, supra* note 33 at 514-16 (Whittaker, J., *dissenting*). Also, under 32 C.F.R. § 163.80-5 "When deemed reasonably necessary for the protection of the Government, the (title vesting clause) may be supplemented by additional protective provisions, such as personal or corporate guarantees, subordinations or standbys of indebtedness, special bank accounts, and other protective covenants. . . . ." Such language clearly is inconsistent with a theory of title ownership and incremental purchase. *See Marine Midland, supra* note 19 at 398.

[36] *In re Double H Products Corporation,* 462 F.2d 52, 55 (3d Cir.1972) citing *Boeing Company v. United States,* 338 F.2d 342, 345 (1964), *cert. denied,* 380 U.S. 972, (1965); *See also In re Read-York,* 152 F.2d 313, 316 (7th Cir.1945).

[37] *Marine Midland, supra* note 19. Actually, *Marine Midland* was not the first case to rule that title vesting only gave the Government a lien against property. *See United States v. Lennox Metal Mfg. Co.,* 225 F.2d 302 (2d Cir. 1955). In this case, the Court apparently viewed certain inequitable conduct on the part of the Government as prejudicing, and therefore limiting, the Government's interest in title vested property to that of an equitable lien. *Id.* at 317. After so finding, the Court then went on to hold that this lien could not be asserted by the Government because of its unfair conduct in its relationship with *Lennox.* The case, besides being limited to a quite

was attempting to repossess certain assets of a bankrupt defense contractor. The government intervened claiming ownership of the assets under the title vesting provision of the contract.[38] After reviewing the terms and conditions of the title vesting clause contained in the procurement contract, the *Marine Midland* court concluded that:

> [I]t would do violence to the system that the clause and regulations set up to say that the government "owns" covered property when it is apparent that the government specifically exempts itself from most of the incidents of ownership. Reading the clause and all of the regulations together, it is plain that ownership is not taken, but rather that the government takes a security interest in the contractor's inventory, to secure the funds loaned to the contractor through progress payments. Such an interest is readily identifiable in common parlance as a lien . . . despite the use of the term "title."[39]

In making its ruling, the *Marine Midland* court viewed the 1958 Amendments as tantamount to a repeal of the provisions prohibiting the advancement of government funds adopted in 1823, at least as applicable to contractor financing payments, and therefore the legal fiction which had developed around this statute was merely a historical appendage waiting to be revised and updated by the courts.[40] As such, it was easy to find that

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distinctive set of facts, contained none of the policy assertions of *Marine Midland* and has been widely criticized. *See* Pasley, *The Interpretation of Government Contracts: A Plea for Better Understanding,* 25 Fordham L.Rev. 211, 230-40 (1956); Whelan, *Government Supply Contracts: Progress Payments Based on Costs; The New Defense Regulations,* 26 Fordham L. Rev. 224, 241-42 (1957).

38 *Marine Midland, supra* at note 19, at 397.

39 *Marine Midland, supra* at note 19, at 399.

40 *Marine Midland,* supra at note 19, at 401.

> The 1958 enactment . . . removed the reason that title vesting had been construed literally before, because it removed the need to make progress payments appear like partial purchases [as necessary under the 1823 prohibition on advances of government funds]. The 1958 Act cleared the way for just the type of examination of the title vesting

cases which had been decided on pre-1958 law and supported title vesting had done so for purposes of maintaining a legal fiction; a justification which was no longer necessary after the 1958 enactment.[41] The court also attempted to distinguish post-1958 case law on somewhat technical grounds, but this effort was to some extent unsuccessful[42] and ultimately unnecessary to its fundamental ruling; which is that even though history and federal law say its a title, if it walks and quacks like a lien, it's a lien.

Once the court had established that the government possessed a lien interest, the next question was obviously priority against competing claims. The *Marine Midland* court noted a Supreme Court ruling in *United States v. Kimball Foods* which stated that "special rules to govern the priority of . . . federal . . . liens . . . would be justified if necessary to vindicate important national interests."[43] Unfortunately, no such rules had yet been formulated, so the Court concluded that in its consideration, the government in this instance should be given the same priority as a "general creditor," and that the advancement of funds gave it a lien "analogous to"[44] a purchase money

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> clause and regulations that [will] determine exactly the kind of interest that the government has provided for itself. That examination concluded that the interest plainly is not ownership and has the nature of a lien. Thus, although we understand why the word "title" is used in the clause, for what was once a very important purpose, we see no present reason to call the government's lien interest anything other than what it is, as the clause and regulations show it to be.

41 *Marine Midland, supra* at note 19 at 400-01, analyzing *Boeing Co. v. United States,* 168 Ct.Cl. 109, 338 F.2d 342 (1964), *cert. denied,* 380 U.S. 972 (1965). ("*Boeing* comes from a legal setting in which it was necessary to characterize title vesting fairly literally in order to preserve the legality of the government's practice of making progress payments. . . ." Because *Boeing* involved contracts dated before the 1958 legislation, "a literal reading of 'title' for the purposes of title vesting was still necessary.").

42 *See* Ransick, *supra* note 6 at 98. (*Marine Midland's* attempt to reconcile its theory with previously decided cases not particularly fruitful).

43 *Marine Midland, supra* note 19 at 404 (citing *Kimbell Foods v. United States,* 440 U.S. 740 (1979)).

44 *Marine Midland, supra* note 19 at 403-04.

security interest (PMSI).[45] This would grant to the government a lien which for purposes of this article shall be referred to as a Contract Advance Payment Security Interest (CAPSI).[46] Although the court in *Marine Midland* stated that its decision to give priority to the Government at the level of a PMSI "merely follow[ed] the modern practice of giving priority to purchased money interests,"[47] it failed to cite any authority describing where such "modern" practice was derived.[48] The ultimate result of this case is somewhat paradoxical in that had the government been given title, its might well have fared worse than it ultimately did by receiving a lien interest, which is a lesser form of ownership.[49] Finally, in making its decision, the

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45 Under the Uniform Commercial Code (the "UCC"), a lender may acquire a purchase money interest in property to the extent that it "gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used." U.C.C. § 9-107. A PMSI is usually granted a priority ahead of most other liens. Often courts require an explicit finding that the money was "in fact so used," requiring that there be "a one-to-one relationship between the debt and the collateral" before a lender holds a purchase money security interest, therefore, an after acquired property clause will destroy such an interest. *Southtrust Bank v. Borg-Warner Acceptance Corp.*, 760 F.2d 1240, 1243, *reh. denied*, 774 F.2d 1179 (11th Cir.1985); *Township of Stambaugh v. Ah-Ne-Pee Dimensional Hardwood, Inc.*, 841 F. Supp. 803, 808 (1993). *See also United States v. Ballard*, 645 F. Supp. 788, 792 (D. Mont. 1986) (Creditor must show that the money lent was in fact used to acquire an interest in the collateral in question). *But see, In re Island Airlines Hawaii, Inc.*, 39 B.R. 558 (D. Hawaii 1984) (no identification of specific collateral purchased with intended advances is necessary).

46 The exact nature of the Government's interest was generally defined but not named in *Marine Midland*. The court held that the government's interest was one closely analogous to a PMSI, though something less than "full title." *Marine Midland, supra* note 19 at 404. Despite this rather amorphous definition of the Government's interest, the *Marine Midland* court was able to conclude that it prevailed over most lesser interests. It appears in its reasoning that the court considered it to be at the level of a PMSI (*i.e.*, equivalent to it in priority because of its link to value given) but did not want to call it a PMSI (which it is not, because it would not meet all the PMSI requirements, such as filing for perfection and after acquired property coverage). Coinage of the term CAPSI (pronounced CAP-see) was necessitated by the fact that no name has appeared in later case law to describe such a lien.

47 *Marine Midland, supra* note 19 at 404.

48 *Id. See also Welco Ind., supra* note 25 at 306.

49 This odd result was noted in the concurring opinion:

Marine Midland court noted the importance of a uniform rule of decision in governmental procurement cases and observed that just such an objective was one of the goals behind the 1958 Legislation.[50] Ironically, this case was to mark the last time a consensus was achieved by the courts regarding the nature of the government's interest under the title vesting clause.

Only a few months after the *Marine Midland* decision, another bankrupt military contractor case was decided; but with scant analysis it declined to follow the lien theory.[51] Within a year of *Marine Midland*, yet another case concerning a bankrupt defense contractor was heard, again a court soundly rejected the lien theory, but this time it sought, through extensive analysis, to reestablish the hegemony of the title theory interpretation. The case involved the bankruptcy of American Pouch Foods, Inc. (APF), a manufacture of Meals Ready to Eat for the Defense Logistics

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> The court then holds that . . . the government's security interest prevails over the plaintiff's state-created lien without regard to whether that lien antedated the government's. The result is that the lesser security interest the government has in . . . [contractor's] property as a result of the court's holding (a lien on, rather than title to, the property), gives the government greater rights in that property (priority for its lien over the plaintiff's possibly prior lien) than it would have had if it had title. *Marine Midland, supra* note 19 at 406 (Friedman, C. J., concurring).

50 *Id.* at 404:

> The case before us clearly calls for a uniform rule of decision . . . one of the primary purposes of the extensive and detailed regulations for federal procurement to promote standardization and uniformity throughout the federal system. Indeed, specifically for the purposes of the present case, it was the explicit desire of Congress itself, when it enacted the 1958 authorization for advance, progress, partial and other payments, that "uniform government-wide regulations . . . be developed to guide the exercise of the . . . advance payment (and progress payment) authority. . . ."

51 *Verco Ind., supra* note 25 at 615 (public policy, especially in the national defense area, favors a literal interpretation of title vesting provisions in federal procurement contracts).

Agency. The *APF* court noted at the onset that had it adopted the lien theory, there was a possibility that APF's interest could prevail over that held by the government.[52]

In the *APF* ruling, the court observed that there are fundamental differences between "progress payments" (which purport to be incremental purchases of work-in-progress, and the government receives "title") and "advance payments," (which are considered loans made against the work-in-progress, and the government receives a "lien").[53] By treating the interest the government receives in the former as a lien, both interests would be identical and the distinction between the two would not make sense, clearly

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[52] *APF, supra* note 25 at 1018 ("it is possible that if the [*Marine Midland*] Court's reasoning were applied to the instant case, the result would be different, requiring a judgment for APF.") *See also Id.* at 1202 (Swygert, J. *dissenting)* ("I would hold then, that . . . the Government . . . held an unperfected security interest. As such, its rights were subordinate to those of a variety of other creditors, including the debtor-in-possession.").

[53] *APF, Id.* at 1018-19:

> "Progress payments," . . . are payments made as work progresses, and are determined on the basis of costs incurred, percentage of work completed, or the stage reached in a particular project. 32 C.F.R. § 163.11. "Progress payments" thus presume some performance under the contract, even though they are made prior to acceptance by and delivery to the Government of the finished product. "Advance payments," while also made well before acceptance and delivery, do not require any performance, but rather are made "prior to, in anticipation of, and for the purpose of complete performance under a contract or contracts." 32 C.F.R. § 163.9 (1982). As can be seen by these descriptions, "advance payments" operate on the order of a loan, while "progress payments" are more in the nature of purchases. As was noted over a quarter of a century ago: It has long been recognized and understood that an "advance payment" is a loan by the Government and can be made "only upon adequate security" . . . but . . . [progress payments] are payments made by the Government in purchase of materials and are authorized when ownership thereto vests in the Government. . . ."

a result that was neither intended by the enabling legislation,[54] nor a mere random act of history.[55] The *APF* court also noted that in fact, courts had not viewed title vesting as merely a "legal fiction"[56] and that the 1958 Amendments were not the fundamental change *Marine Midland* had suggested.[57]

While the *APF* court explicitly rejected most of *Marine Midland's* argument, it failed to address the central question of whether an interest which is in effect a lien should be given the status of a title merely because of the nominal use of that word in statutes and regulations. The court admitted that in another context, such as general commercial law, the actual circumstances would appear to grant a lien interest and not give full title.[58] But in this instance, the *APF* court attempted to distinguished the case before

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54 *APF, Id.* at 1019 ("This fundamental, historical difference between "progress payments" and "advance payments" is easily discerned in the enabling legislation.").

55 *Id.* at 1020 ("The different treatment accorded to "advance payments" and "progress payments" in the current statute and regulations is not accidental, but rather is a result of historical development.").

56 *Id.* at 1021 ("Because the courts can be assumed to have accepted the almost universally-held belief that progress payments were legal, it is reasonable to believe that, contrary to *Marine Midland's* view, those courts did not interpret "title vesting" clauses merely with the goal of "preserving the legality" of the Government's procurement practices. citation omitted. Rather, this Court believes that the legality of such payments was simply, and properly, taken for granted, allowing the Courts to proceed to the straight forward task of contract interpretation.").

57 *Id.* at 1021 n.8 ("In reviewing the proposed 1958 amendment to 10 U.S.C. § 2307, Robert Dechert, General Counsel of the Department of Defense, commented: '[T]his Department has long considered that it had adequate authority in law to make . . . progress payments under appropriate contractual agreements. . . .' Senate Comm. on Government Operations, Small Business Concerns—Opportunities to Obtain Government Purchases and Contracts, S. Rep. No. 2201, 85th Cong., 2d Sess., reprinted in 1958 U.S. Code Cong. & Ad. News 4021, 4032."). *See also, APF, supra* note 25 at 1196 ("We do not agree . . . that because the 1958 enactment of express authority to make progress payments removed the original motive for using a title vesting clause, the construction of the clause should change at the time of that enactment."). *But see, APF, Id.* at 1190 (Swygert, J., dissenting) ("The statute [the 1958 legislation] and legislative history are silent on the question of whether the title-vesting clause that traditionally accompanied progress payments should be interpreted literally or as a de facto security interest.").

58 *APF, supra* note 25 at 1193.

it by noting the historical tradition of granting title, especially in the area of national defense.[59] However, this argument fails to note the modern trend of treating the government as other commercial buyers;[60] a trend likely to be accelerated by a recent large scale shift in DOD procurement regulation from specialized military specifications to standardized commercial practices.[61]

After the *APF* decision, the lien theory gained little support outside of the claims court,[62] with some courts, with little or no discussion, merely dismissing *Marine Midland* in a footnote as "wrongly decided."[63] Thus the claims court and the rest of the federal judiciary continue to this day to disagree about the exact nature of the government's interest in property under the title vesting rules. An interesting result of this split is a case concerning Denalco Corp., a bankrupt Army contractor whose bank asserted a lien on certain machinery covered by the title vesting clause. When the case was first heard in the bankruptcy court, it was decided that the government held full title to the machinery in question, and its title interest therefore defeated the bank's lien.[64] However, on a jurisdictional

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59 *In re Verco, supra* note 25 at 617.

60 *See, In re Wincom Corp.*, 76 B.R. 1, 2 (Bankr. D. Mass 1987) ("In the absence of a specific statutory exception, the government should be held to the same standards as any other contracting party."); *University Medical Center v. Sullivan (In re University Medical Center)* 973 F.2d 1065, 1077 (3rd Cir. 1992) ("Nor do we believe that government agencies, after choosing to contract with private corporations, should receive more favorable treatment than other similarly situated parties."). *See generally,* Larry J. Gusman, *Rethinking Boyle v. United Technologies Corp., Government Contractor Defense: Judicial Preemption of the Doctrine of Separation of Powers,* 39 Am. U. L. Rev. 391 (1990); Terrie Hanna, *The Government Contract Defense and the Impact of Boyle v. United Technologies Corporation,* 70 B.U. L. Rev. 691 (1990).

61 *See Infra* notes 77 and 78 and related discussion.

62 The United States Claims Court was the original jurisdiction of *Marine Midland,* whose lien theory has been followed almost exclusively in that court. *See, Welco Ind. supra* note 25, *Skip Kirchdorfer, supra* note 25, *Geneva, supra* note 25. *But see United States v. Hartec Enter., Inc., Infra* note 71, and related discussion.

63 *Economy Tool, supra* note 25 at 711, n.3. *See also In re Denalco, supra* note 25 at 80 n.3 (*Marine Midland* was "incorrectly decided").

64 *In re Denalco, supra* note 25 at 77.

technicality, the decision was vacated and the case reheard in the claims court, where the lien theory is followed. The second time around the bank was found to have a superior interest in the disputed machine; its lien succeeding the lien held by the Government.[65]

Interestingly, the claims court in *Denalco* stated that, in the interests of a uniform national rule, it would have preferred to follow the title theory,[66] but was unable to do so because of the *Marine Midland* precedent.[67] This case clearly demonstrates how difficult and costly it may be for DOD manage its procurement process under unclear title vesting rules. In the *Denalco* case, not only did the government lose, but it took almost four and one half years between the time Denalco filed for bankruptcy and the case was finally settled in the claims court. The *APF* case took nearly five years to wind its way through the bankruptcy courts.

To date, no other jurisdiction has definitively adopted the lien theory,[68] although there have been some sympathetic discussions of its merits.[69] The claims court, however, despite the language in *Denalco*,

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65 *Geneva, supra* note 25.

66 *Id.* at 387, n3 ("As a court with nationwide jurisdiction, it is in the interest of public policy that the law be applied consistently. The court is uneasy with the thought that two plaintiffs with similar causes of action will be treated differently under the law merely because one litigates in the bankruptcy courts and one litigates in the United States Claims Court. This court would be inclined to adopt the reasoning of the title theory, but it is not in the position to do so.").

67 *Id.* at 387 n3, ("The court's decision is based upon the reasoning of *Marine Midland* because '[a]ll published decisions of the United States Court of Claims are accepted as binding precedent for the United States Claims Court, unless and until modified by decisions of the United States Court of Appeals for the Federal Circuit or the United States Supreme Court.'" United States Claims Court General Order No. 1, October 1, 1982, reprinted in 1 Cl. Ct.").

68 With one narrow exception, *see infra* note 71.

69 *In re Wincom Corp., supra* note 25 at 3 (Court "reluctantly" followed title vesting policy, agrees in dicta with *Marine Midland* arguments); *APF, supra* note 25 at 1201. (In his dissent, Judge Swygert asserted that not only is the Government limited to a lien interest in property, but also that state law controls and the Government should be held to the same requirements as all other secured parties). *See also Id.* at 1196 ("We acknowledge the reasonable of the *Marine Midland* view if we were considering the title vesting provisions on a clean slate.").

currently appears no less reluctant to reaffirm the *Marine Midland* ruling, with a recent decision supporting that case without either discussing the split it caused or reconsidering the merits of the lien theory.[70] Interestingly, in another recent ruling, the Fifth Circuit has rejected the title theory and adopted the *Marine Midland* lien theory in a criminal case, ruling that the removal of certain property from a contractor's machine shop was not a theft of government property, since the government, under *Marine Midland*, did not actually have title to, and thus did not own, the property in question.[71] It is uncertain what effect, if any, this decision will have on debtor / creditor cases in the Fifth Circuit.

At times the government appears to want its cake and eat it too. Although it has tenaciously defended its title interest in all bankruptcy and claims court cases over the last 14 years, when it suited its own interests the government apparently had no difficulty temporarily adopting *Marine Midland* and arguing *for* the lien theory.[72] The case involved a personal injury suit by a worker injured on a vessel in a Lockheed shipbuilding yard; the U.S. Government was named a third party defendant. Under applicable law, Lockheed was required to indemnify the Government unless the Government was the "owner" of the vessel upon which the injury occurred. The Government asserted that it did not actually "own" the vessel, but merely held a security interest under the lien theory of *Marine Midland*.[73] The court ultimately rejected the Government's argument, noting that *Marine Midland* applied to "debtor-creditor law, a situation significantly different than the present" case.[74] The implications for other areas of law, had the Government succeeded in its pro-*Marine Midland* argument, is unclear.

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70 *See Skip Kirchdorfer, supra* note 25 at 1581 (briefly and with little discussion finding that the "title vesting clause established a security interest in favor of the Government in material and equipment covered by the progress payments.").

71 *United States v. Hartec Enter., Inc.*, 967 F.2d 130, 132-33 (1992).

72 *Faustino v. Ansul Corp. et al.*, 1983 WL 995 (W.D. Wash. 1983).

73 *Id.* at *1.

74 *Id.*

IV. THE CAPSI ALTERNATIVE

The *Marine Midland* decision is problematic for at least two reasons. First, the arguments used to support the finding of a lien interest are somewhat disturbing in that, if *Marine Midland* is correct, the plain meaning of statutes, in contradiction of legislative intent, can easily be circumvented by the court system through the construction of alternative "legal fiction" case law. And, once such a fiction has outlived its usefulness, it can just as easily be discarded despite accumulated precedent clearly to the contrary. That the courts might navigate so consciously around the plain meaning of a statute to achieve independent ends brings into question the fundamental foundations of the judicial system.[75] Of course, the *Marine Midland* court pointed to the 1958 Amendments as the impetus for its deconstruction of the title vesting fiction. This, however, brings to point its second weakness. Had Congress actually intended the 1958 Amendments to supersede all of the historical title vesting case law, including relevant Supreme Court decisions upholding it as a valid legal application of a "title" interest in property and over 100 years of practice in government contract law, it would be expected that there would be at least some legislative history indicative of such intent. Unfortunately, none appears to exist.[76] As noted, many courts currently believe that the only fiction involved in this controversy is the rational of the *Marine Midland* decision.

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[75] Further discussion of this topic is well beyond the scope of this article. See generally, John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into Speculative Unrealities,* 64 B.U.L. Rev. 737 (1984); Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution,* 37 Case W. Res. 179 (1987). *See also,* N. Singer, Statutes and Statutory Construction, at 45.01, 1-3 (Sands 4th ed. 1984); R. Dickerson, The Interpretation and Application of Statutes, at 10-11 (1975).

[76] *See In re Coated Sales, Inc.,* 112 B.R. 560, 563 (Bankr. S.D. N.Y. 1988), where the court stated that:

> It is inconceivable that the 1958 legislation . . . would have abolished standard contractual protections, such as title vesting provisions, which had long been utilized by the Government to protect its property interests in contract goods, without even a mention of such intent anywhere in the legislative history. If Congress intended to overrule such long-standing Supreme Court precedents as *Ansonia,* it would have made such an intent explicit.

Despite these shortcomings, the lien theory of *Marine Midland* should ultimately prevail. This is because of its strongest attribute; it offers fidelity to the historical, functional, and legal concepts of lien and title. Clearly, given the contractual language involved in defining a contractor's rights and responsibilities with respect to covered property, the government has reserved for itself a lien in that property. If this is not so, then the courts should begin immediately to distinguish between "public title" (which has no requirement other than to be so named in a statute or regulation) and "private title" (which must actually adhere to some external and historical notions of what "title" means on a functional level). Given the trend toward treating the government on the same level as other commercial parties absent specific policy requirements, such a bifurcation of title theory (a de facto result of title vesting) would be no less attractive than the adoption of the lien theory itself.

Adoption of a CAPSI would also fit well with new procurement policies which were announced by DOD in the Summer of 1994. The new policies will change the way the military purchases a vast array of goods and services, making the Pentagon more like a commercial buyer by eliminating a complex web of military product specifications and empowering defense officials to purchase items available in the commercial world without the need for extensive paperwork.[77] These change are part of a broad based effort to increase efficiency in the way DOD makes its purchases, and is part of Vice-President Gore's comprehensive strategy to reduce inefficiencies in government, which is expected to be furthered by pending Congressional reforms of the Acquisition Laws.[78] Given these reform efforts, it seems sensical that the government begin following many of the legal practices of the commercial world as well, including a faithful adherence to the traditional and widely accepted legal notion of what constitutes true title. The adoption of a CAPSI policy[79] would apply contract law to the

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77 See Debra Polsky Werner, *Demise of Milspecs May Spur Industry Upheaval,* Defense News, Aug. 15, 1994, at 1; Peter Grier; *Reengineering the Industrial Base,* Air Force Magazine, Aug. 1994, at 36.; *DOD, Perry Orders DOD to Shift From Milspecs to Commercial Standards Where Possible,* Federal Contracts Report, July 4, 1994.

78 See, Eric Schmitt, *New Defense Nominee is Taking on Pentagon's Unwieldy Buying System,* N.Y. Times, January 31, 1994, at p. 12, Section A, Col. 1.

79 The alternative to the adoption of a CAPSI would be to simply grant the Government a PMSI in all covered property. This approach would have the advantage of utilizing a pre-existing priority scheme instead of adding another layer to the body of secured interest law. However, because the government would probably be allowed a

government as it would to most other commercial contracting parties, recognizing that legal concepts such as lien and title exist beyond mere textual designations of where they shall be deemed to apply.[80] Despite the Supreme Court's past endorsement of the title vesting provision, it has also held in an analogous context that the Internal Revenue Service, despite legal precedent and statutory language designating its interest in certain property as title, actually possessed only a lien in that property.[81]

The lien theory is also attractive in that a CAPSI would protect the government's monetary interest to the extent of the value placed into the contract by the government,[82] thereby eliminating the potential for unjust enrichment of the government at the expense of other third party creditors; a result which nearly occurred in the *Denalco* case. By viewing the Government's interest in property as defined by a CAPSI as one that enables it to take out of a contractor all of the value that the government has put in, a CAPSI grants to the government that which any other party would receive in similar circumstances. Although not specifically defined as such in the case law,[83] given the above argument, a CAPSI should have the same level of priority as a PMSI.[84] There is, however, the problem of filing and notice

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blanket security interest covering after acquired property, it wouldn't be a true PMSI, thus bifurcating the PMSI system, a result no more attractive than having a dual PMSI / CAPSI system.

80 *See* Ransick, *supra* note 6 at 100 (*Marine Midland* should be seen "as a policy-based attempt to bring title vesting in government contracts into line with commonly accepted commercial practices under the U.C.C.").

81 *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209-211 (1983).

82 *Marine Midland, supra* note 19 at 404 ("government should be able to take out of the [contract] the value that it has put in, if that value is identified with specific property.").

83 Neither *Marine Midland* nor *Welco* explicitly decided the issue of the priority of the government's CAPSI interest over all other competing interests. In *Marine Midland,* the court stated that the "government's security interest under its title vesting procedures [is] paramount to the liens of general creditors." *Id.* at 404.

84 The shift to a CAPSI may change the Government's rights to recover property, depending on the level of priority of the granted to the CAPSI. If a debtor is in possession of property but holds no accompanying ownership interest in it, the owner is entitled to immediate relief from the automatic stay and recovery of the property under § 362(d)(1) of the Bankruptcy Code. For the same result under a lien scenario,

as the government is currently not required to file in order to give its security interests priority as is generally required in commercial transactions.[85] Such a problem could be resolved by either requiring the government to file[86] or by having a CAPSI perfect automatically upon the contracting party gaining an interest in covered property; the latter appearing to be the rule in cases currently following the lien theory,[87] with the former clearly being

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a CAPSI would have to defeat the hypothetical lien of the trustee, which is that of a judicial lien creditor. Bankruptcy Code at § 544(a). Although a CAPSI would have the equivalent priority of a PMSI, it would have different requirements for perfection (e.g., it might not require filing of a financing statement, if would probably cover after acquired property, there would probably be no need to specifically match funds received to funds spent . . . etc.)

85 *See Welco, supra* note 25 at 307.

86 Although often rejected as unduly burdensome on the Government given the large number of contracts it awards, this problem would be easily solved by including within each procurement contract a requirement that the contractor file notice at the appropriate office and submit documentation of such filing together with its request for the contract's first progress payment. In stating that the proper course would be to hold the Government to UCC rules for perfecting security interests, it was noted that:

> The Government's assertion at oral argument that incorporating the UCC into federal law would destroy the value of billions of dollars of government liens is an argument against retroactive application of such a rule, not an argument that the government would be unable to protect its interests under the UCC in the future. *APF, supra* note 25 at 1201 (Swygert, J. dissenting).

87 *Welco Ind., supra* note 25 at 304. ("the security interest which the Government derives on the basis of its progress payments is one that is perfected simultaneously upon the extension of those payments to the contractor."). This, however, creates the problem of "secret liens" and somewhat defeats the UCC's goal of notice to creditors. Especially when the goods involved are ordinary, such as a screwdriver, and not inherently military in nature, it may be difficult for potential creditors to obtain information about all relevant government liens on property. *See APF, supra* note 25 at 1201 (Swygert, J. dissenting). Of course, the situation to some extent exists currently with a "secret title" scheme.

more faithful to the UCC goal of uniform commercial laws and its policy of prior notice and first in time priority.[88]

V. CONCLUSION

The end of the Cold War and the subsequent massive reductions in defense spending have caused a large scale rethinking of the Pentagon's future role in procurement and acquisition. Despite the fact that the split which occurred in the interpretation of the exact nature of the government's interest in property happened over twelve years ago, the courts appear no closer to finding a uniform resolution today then when *Marine Midland* was first decided. With the prospect of an accelerated number of contractor bankruptcies being filed as the defense industry moves into the next phase of its consolidation, a resolution of the Title vs. Lien controversy has never been more important. Such a resolution would add certainty and efficiency to the procurement process in general, and would also save the taxpayer's the considerable costs involved in contractor delays and protracted government litigation.

However, if an affirmative outcome is to occur outside of the judicial system, it apparently will take the concerted effort of high level DOD officials or another interested party to propose and shepherd an amendment through the still considerable contracting bureaucracy. This in light of the fate of the only formally proposed amendment to the Federal Acquisition Regulations which would have resolved the Title vs. Lien issue (albeit in favor of title). The draft proposal was introduced five years ago, languished through an extended, reextended, and then further extended period of review, only to be ultimately withdrawn, without any action having been taken, in February of 1994.[89] Thus the fate of Title vs. Lien remains in limbo, waiting in the wings of the acquisition process, ripe for

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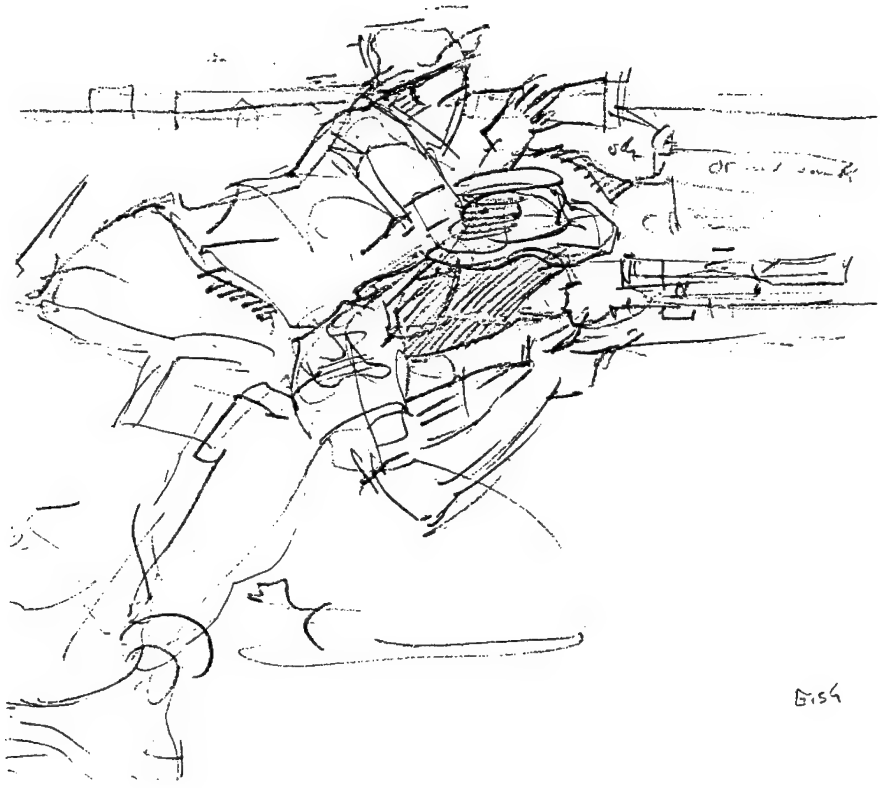
88 See U.S.C. § 1-102(2) ("Underlying purposes and policies of this Act are (a) to simplify, clarify, and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; (c) to make uniform the law among the various jurisdictions.").

89 48 C.F.R. Part 52, 54 FR 18631, May 1, 1989 FAR Case 89-31 (proposed rule to clarify that the Government takes title in the form of ownership rather than a lien when progress payments are made); 48 C.F.R. 52, 59 FR 21316, *21329 FAR Case 89-31, Title To Property Under Progress Payment Clause Feb. 2, 1994. 54 FR 5750 (Proposed rule withdrawn).

either resolution, or, if the current reductions in defense spending do result in a large number of contractor bankruptcies, protracted litigation.



* Sketch of U.S. Marines on the rooftop of the U.S. Embassy in February 1993 by Colonel Mike Gish, USMCR, Marine Corps Combat Artist.

RULES OF ENGAGEMENT IN SOMALIA: WERE THEY EFFECTIVE?

Colonel F. M. Lorenz, USMC **

I. INTRODUCTION

On January 10, 1994, the Associated Press reported an incident in Somalia that was widely published in the United States. The headlines read: "U.S. snipers kill pregnant Somali woman"[1] The Associated Press further reported that the "rules allow peace keepers to shoot anyone with a machine gun, rocket propelled grenade, or other heavy weapons." This incident, with corresponding negative publicity, caused a change in U.S. policy two days later when the U.S. Central Command ordered more restrictive rules of engagement for snipers in Somalia. The incident raises several important questions concerning the rules for the use of deadly force by U.S. personnel. This article will attempt to answer the following questions: What were the rules of engagement for U.S. forces in Somalia in early January, 1994? Were the existing rules effective and necessary for force protection? What factors led to a change in the rules of engagement? What lessons can be learned from the experience with rules of engagement in Somalia?

II. BACKGROUND

U.S. forces arrived in Somalia in early December of 1992 as part of "Operation Restore Hope," a multi-national expedition under the command of Lieutenant General R. B. Johnston, U.S. Marine Corps. The I Marine Expeditionary Force (I MEF) command element formed the nucleus of the combined task force. The country had been devastated by two years of civil war, and the government had ceased to exist. Bands of looters and gunmen had laid waste to the country, and relief organizations could not deliver food

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1 Washington Times, Jan. 10. 1994. at A1. Also, see *Somali Slain, U.S. Snipers Blamed,* San Diego Union, Jan. 10, 1994, at 1.

to the hungry. The mission of Operation Restore Hope was narrow and clearly defined: to provide security for the delivery of relief supplies.[2] The U.S. plan was to turn over the operation after a few months to the U.N., which would have the formidable task of rebuilding the nation.

Before the arrival of U.S. forces, the U.S. Central Command (CENTCOM) developed rules of engagement that were designed to accomplish the mission and provide for force protection. Rules of engagement (ROE) are the means by which the U.S. National Command Authorities and the military chain of command authorize subordinate commanders to employ military force.[3] U.S. operations in Somalia were conducted under the control of CENTCOM and the initial rules of engagement were drafted by CENTCOM in response to the conditions that existed in Somalia in November and December, 1992. The greatest threat came from the presence of numerous armed individuals on the streets, as well as those in technical vehicles[4] or manning heavy weapons. The initial ROE will be referred to as the "UNITAF ROE," since they were employed by Unified Task Force (UNITAF) Somalia during Operation Restore Hope, which lasted from December 9, 1992 to May 4, 1993.

The UNITAF ROE used innovative language in an effort to give commanders the flexibility to accomplish the mission, provide for self defense, and disarm individuals and vehicles that posed a threat. The standard U.S. peacetime ROE[5] require more than a "threat" before an individual can use deadly force in self defense. Special circumstances in Somalia required adoption of language that had never been used before in U.S. ROE:

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2 Frederick Lorenz, *Law and Anarchy in Somalia*, Parameters, U.S. Army War College Quarterly, Winter 1993-94, at 27.

3 See Navy Warfare Publication (NWP) 9A, The Commander's Handbook on the Law of Naval Operations (1989) at 2.

4 The term "technical vehicle" referred to a vehicle with a crew served weapon mounted on the back. The "technical" became the symbol of mobile destructiveness in Somalia.

5 CENTCOM Peacetime Rules of Engagement are contained in USCINCENT Order 525-11 and are classified secret.

> Crew served weapons are ***considered a threat*** to UNITAF forces and the relief effort whether or not the crew demonstrates hostile intent. Commanders are authorized to use ***all necessary force*** to confiscate and demilitarize crew served weapons in their area of operations. . . . Within areas under the control of UNITAF Forces, armed individuals ***may be considered a threat*** to UNITAF and the relief effort whether or not the individual demonstrates hostile intent. Commanders are authorized to use ***all necessary force*** to disarm individuals in areas under the control of UNITAF. Absent a hostile or criminal act, individuals and associated vehicles will be released after any weapons are removed / demilitarized (emphasis supplied).[6]

During the first month of Operation Restore Hope, there were questions of interpretation of the word "threat" pertaining to technical vehicles. If technical vehicles were classified as a "threat," could they be fired on at will? There were disagreements among the operational staff of UNITAF on this question, and it was finally presented to the UNITAF commander for resolution. The decision was consistent with the intent of the drafters of the ROE: commanders did not have the authority to immediately attack technical vehicles (or armed individuals) but they could be approached, challenged, and "all necessary force" could be used to disarm the individuals or vehicle. Note the different language for crew served weapons and armed individuals. This language ("may" as compared to "are") was designed to provide flexibility in dealing with armed individuals, who do not pose the same threat as a crew served weapon. The unit leader could approach the armed individual or vehicle and force could be used, including deadly force, if the weapons were not voluntarily surrendered.

The UNITAF ROE were welcomed by the coalition countries, and generally accepted by Marines and Soldiers of UNITAF as effective and reasonable. This was due in part because there was very little violence directed at U.S. forces during the first five months. The crew served weapons that were classified as a threat were withdrawn or hidden by their

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[6] The full text of the UNITAF ROE were classified secret during the operation, but have since been declassified in accord with a CENTCOM directive. Unclassified ROE cards were distributed to all personnel of UNITAF before deployment, Lorenz, *supra* note 2, at 30.

owners in response to the overwhelming show of force by UNITAF. UNITAF forces were rarely challenged when confiscating weapons. During Operation Restore Hope, December, 1992 to May 1993, there was general agreement that the ROE were effective and properly tailored to the existing threat.

III. CHANGING THREAT CONDITIONS

On May 4, 1993, UNITAF Somalia terminated operations and responsibility for the operation was passed to United Nations Operations in Somalia II (UNOSOM/II). Remaining U.S. forces in Somalia were in support of UNOSOM but under the operational control of Major General Montgomery, who was the Commander, U.S. Forces, Somalia. He served in an additional capacity (he was "dual-hatted") as the Deputy UNOSOM Commander. The military commander of UNOSOM was Lieutenant General Bir of Turkey. At the peak of Restore Hope, U.S. forces totaled over 20,000, but the U.S. forces supporting UNOSOM II included only 4,500, many of whom were logistics personnel. A key part of the remaining force was the U.S. Army's Quick Reaction Force which would be prepared to respond to emergencies, but only with the approval of the U.S. force commander.

On the same day as the change of command, 4 May, UNOSOM II adopted essentially the same ROE that had been in effect for UNITAF over the previous five months. This was a welcome decision, because there had been some concern on behalf of the U.S. forces that the UNOSOM ROE would be more restrictive than the UNITAF ROE. UNOSOM II began its operation with ROE that met the needs of force protection, but UNOSOM was about to embark on a greatly expanded mission that would severely test its personnel and the guidelines for the use of force in Somalia.

U.N. Security Council Resolution 814 provided a broad charter to UNOSOM II. Responsibilities included providing humanitarian assistance, rehabilitating political institutions and the economy, promoting national reconciliation, completing the disarmament process, establishing a national police force, and reconstituting the courts and legal system. This ambitious program was undertaken despite serious deficiencies in UNOSOM II command and control mechanisms, as well as its intelligence and logistical capabilities. Soon after the departure of UNITAF, conditions in Somalia, particularly in Mogadishu, began to deteriorate. The Somalis began to test the resolve of the UNOSOM forces and the incidents of armed confrontations were increasing. In response to the threat, at the end of May 1993, Lieutenant General Bir issued "Frag Order 39" which greatly

expanded the ability of UNOSOM personnel to use deadly force. Frag orders are normally used to supplement a basic operational plan on short notice. Frag Order 39 included the following language: "Organized, armed militias, technicals and other crew served weapons are considered a threat to UNOSOM Forces and ***may be engaged without provocation***." (emphasis added). The Frag Order also included a provision that permitted the attack from the air on certain "armed Somalis in vehicles moving from known militia areas" at night, after obtaining approval from the Quick Reaction Force Commander.

Soon after the UNOSOM Commander issued Frag Order 39, an incident occurred that proved to have grave implications for the operation. On June 5, 1993, UNOSOM forces made a forced entry into the weapons storage facility under the control of Mohammed Farah Aidid in Mogadishu. Two Somalis loyal to Aidid were killed in the confrontation and this began an escalation of violence directed toward UNOSOM forces. Shortly thereafter, 24 Pakistani peace keepers were killed by a vengeful Somali mob. The U.N. Security Council called for action to bring the responsible parties to justice, leading to a decision to declare Aidid an outlaw and to put a price on his head. The U.S. forces supported this decision and a series of U.S. special operations were launched to capture Aidid. On October 3, there was the tragic incident at the Olympic Hotel in Mogadishu in which 18 U.S. Army Soldiers were killed in a bloody battle. This incident was the turning point for U.S. involvement in Somalia, and it demonstrated the danger of Rocket Propelled Grenades (RPG) in the hands of the Somalis. Both helicopters lost in the battle were downed by RPG rocket launchers. Still, RPGs were not mentioned in the ROE, other than the fact that they may be included in the definition of "armed individuals."

Following the incident at the Olympic Hotel there was a reversal of U.S. policy. Intense media coverage of a U.S. soldier being dragged through the streets of Mogadishu prompted a public and congressional outcry, and President Clinton made the decision to abandon U.S. support of efforts to apprehend Aidid. In less than a year, Operation Restore Hope had deteriorated from a humanitarian effort into a dangerous morass. President Clinton announced that substantially all U.S. forces would be out of Somalia by the end of March, 1994.

IV. COMMAND RELATIONSHIPS

For the first five months in Somalia (the duration of UNITAF-Operation Restore Hope), the lines of command and control were clear and

unambiguous. UNITAF was under the operational control of USCINCENT, and all U.S. forces, with the exception of a handful of U.N. staff, were under the control of the UNITAF commander. By the time of the incident at the Olympic Hotel, the command relationships were more complex, and less clearly defined. Special operations forces had arrived in Mogadishu under the direct control of USSOCCENT. Major General Montgomery, the Commander of U.S. Forces, did not have operational control (OPCON)[7] of the Special Operations force that conducted the Olympic Hotel raid. They reported through a separate chain of command directly to USCINCCENT.

Immediately after the Olympic Hotel incident, the command relationships in Somalia changed again. Additional forces arrived in Somalia and they were under the operational control of a new organization, Joint Task Force (JTF) Somalia. On October 18, the 13th Marine Expeditionary Unit (MEU) from Camp Pendleton, California, arrived offshore Mogadishu, Somalia. As part of the Amphibious Ready Group it was under the operational control of USNAVCENT, the Naval component of CENTCOM. Upon arrival, operational control of the MEU was passed to U.S. Forces Somalia, but when MEU personnel came ashore they were under the tactical control (TACON)[8] of the JTF Commander, Major General Ernst, U.S. Army. Again in Somalia the senior U.S. commander did not have control over operations within his area of responsibility.

During the last two months of 1993, there were four active military chains of command in Somalia. UNOSOM II reported to U.N. Headquarters in New York. Three independent U.S. commands reported to USCINCENT at McDill AFB, Florida: U.S. Forces Somalia, JTF Somalia, and the Joint Special Operations Task Force (JSOTF) which reported to the CINC through USSOCCENT. This situation did not lend itself to clear lines of command and control, and made coordination and implementation of ROE difficult. For example, when marine snipers arrived, there was concern that they would be operating under separate JSOTF ROE that were different than the

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7 Operational control is the authority delegated to a commander to perform those functions of command over subordinate forces involving the composition of the subordinate forces, the assignment of tasks, the designation of objectives, and the authoritative direction necessary to accomplish the mission. Source: Joint Chiefs of Staff Publication (JCS Pub.) 2, Unified Action Armed Forces (UNAAF) Section 3-12b.

8 Tactical control is the detailed and usually local direction and control of movements or maneuvers necessary to accomplish missions or tasks assigned. *Id.*, section 3-12c.

ROE applicable to all other U.S. forces. Marine snipers were finally told they would operate under the same rules as the 13th MEU.

V. RULES OF ENGAGEMENT FOR THE 13TH MEU

When the 13th MEU arrived in Somalia, they were informed that they would be operating under "UNOSOM II ROE."[9] These were essentially the same as the UNITAF ROE except for the additional language of UNOSOM Frag Order 39. That language permitted the engagement of "technicals and other crew served weapons without provocation." This was a significant expansion of the UNITAF ROE and the MEU Commander agreed that aggressive ROE were necessary for force protection.[10] By the time elements of the 13th MEU came ashore in late October 1993, conditions had changed dramatically in Mogadishu, compared to the situation when the Marines departed in May 1993. Changing threat conditions forced U.S. commanders to be concerned primarily with force protection.

During Operation Restore Hope (Dec. 1992 - May 1993) the Soldiers and Marines of UNITAF regularly patrolled the streets, met with local elders and freely traveled in the city of Mogadishu. By the end of October 1993, major parts of the city were off limits to U.S. forces and no patrolling was conducted due to the increased threat. UNOSOM forces, as well as their U.S. protectors were essentially confined to their strong points and compounds, where periodic fire into the compounds, including occasional mortar rounds, was a real threat. Marine snipers were a key element in force protection. In November and December of 1993 they were placed at key intersections and in overwatch positions above the UNOSOM / U.S. forces compounds. Snipers began to engage targets under the "UNOSOM ROE" and Somalis with crew served weapons were legitimate targets, whether or not they demonstrated a hostile act or showed hostile intent. The change in the ROE was promulgated by the JTF to the MEU, which included the provisions of UNOSOM Frag Order 39.[11]

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9 *See* USCINCENT message 151346Z OCT 93 (UNCLASSIFIED) "Except for Those U.S. forces operating in Mombasa, Kenya, UNOSOM II ROE remain in effect for U.S. forces operating in support of UNOSOM II."

10 Interview with Colonel L. D. Outlaw, USMC, 13th MEU Commander (28 June 1994).

11 JTF Somalia, Judge Advocate Memo of 17 October 1993.

In Somalia word travels fast, and the local population was acutely aware of the U.S. ROE. The UNOSOM Psychological Operations Office assisted, and the local paper and radio station announced the policy. Although they did not know the term "ROE," local Somalis knew that they would be shot if they carried a crew served weapon within sight of the UNOSOM / U.S. Forces compound. This proved highly effective in keeping the weapons off the street and reducing the threat to UNOSOM / U.S. Forces.

VI. THE SNIPER INCIDENT OF JANUARY 1994

The sniper incident of January 9, 1994, was the catalyst for a reexamination of ROE in Somalia. On that day Marine snipers of the 13th MEU were ashore under the tactical control of JTF Somalia. They were operating under the modified UNOSOM II ROE that was promulgated to the 13th MEU in October by JTF Somalia.[12] For the two months previous to January 9, the only Marines engaging targets were the snipers, the burden of force protection was on their shoulders, and they took their duties seriously. They had unclassified ROE cards in their hands that told them they could fire on individuals armed with crew served weapons "without provocation." On January 9, snipers observed a pickup truck approaching the compound with a Somali on the back of the truck holding a machine gun on its roof. The weapon observed was a crew served weapon, not the more common AK-47. The target was clearly within the parameters of the ROE, and two shots were fired by the snipers, one shot apparently hitting and killing the gunman.

Shortly after the incident, Somalis appeared at a U.S. checkpoint and claimed a pregnant woman was killed by a U.S. sniper. U.S. personnel did not observe a body, and an investigation by the United States was unable to confirm if the woman died as the result of a gunshot wound or some other cause. Nevertheless, the U.S. media widely reported that "Marine snipers kill pregnant Somali woman."[13] The questions of the press naturally focused on the rules of engagement. Even if the woman died as the result of a sniper's bullet, if the snipers were acting properly, and within the ROE, they would be blameless as long as they took the normal

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[12] Interview with Col. L. D. Outlaw, *supra* note 10. *See also* Unclassified ROE Card issued to 13th MEU Marines on 20 Oct '93, Rule 8 (on file with author).

[13] Washington Times, *supra* note 1.

precautions to avoid collateral injury. The media reported the account of U.S. spokesman Colonel Steve Rausch, who stated that "the Marines fired under U.N. rules that permit them to shoot anyone carrying a heavy weapon."[14] Even though the woman may not have been killed by a snipers bullet, the media correctly reported that the Marines were then acting under the rules of engagement. Nevertheless, within three days the sniper ROE would be changed.

On January 12, 1994, a USCENTCOM message was issued which applied only to snipers and greatly restricted the U.S. ROE in effect in Somalia.[15] On January 14, JTF Somalia promulgated the change to subordinate elements. Individuals with crew served weapons were no longer fair targets for snipers. By January 15, a dramatic change took place in the streets of Mogadishu outside the UNOSOM / U.S. Forces compounds. Machine guns and RPGs were openly displayed as the local population quickly became aware of the "new ROE." This was consistent with previous incidents in Somalia, where the local thieves and trespassers would operate openly, instinctively knowing the limits of U.S. rules of force.[16] The 13th MEU Commander considered the change of January 12, a significant limitation on his Marines and their ability to accomplish the mission of force protection.[17] The new restrictions caused real consternation for JTF Somalia, and the snipers in particular, who felt that their supervisors no longer had the confidence in them to engage appropriate targets.

The decision to restrict the ROE in Somalia on January 12 had a number of other consequences, perhaps unintended. U.S. snipers now had more restrictive ROE than their counterparts in UNOSOM. Moreover, the restriction applied only to U.S. snipers, while the forces were faced with a situation in which Soldiers and Marines, standing side by side, had different ROE, depending on their duty status. U.S. forces who were not acting as snipers could continue to engage targets under Frag Order 39. The

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[14] *U.S. Defends Somali Shooting,* Washington Post, Jan. 11, 1994, at A12. *See also, U.S. Inquiry Defends Somali Shooting,* Chicago Tribune, Jan. 11, 1994, at 3.

[15] The text of the message is still classified, but it can be stated the snipers in Somalia were essentially returned to peacetime ROE.

[16] Colonel F. Lorenz, "*Confronting Thievery in Somalia,*" Military Review, Aug. 1994, at p. 46.

[17] Interview with Colonel L. D. Outlaw, *supra* note 10.

immediate impact was upon the snipers, because they had the burden of force protection. Only they were in the position to engage targets at that time.

VII. "CHANGE" OF ROE vs. "INTERPRETATION"

The sniper incident raises important questions about the implementation of ROE in Operations Other Than War (OOTW). In the OOTW environment, the development and promulgation of ROE are much more challenging than in wartime, due to the ambiguous and changing threat conditions. Somalia was the crucible to test our system of ROE, as well as joint command and control, and there are significant lessons to be learned from the operation.

Local commanders always have the flexibility to "interpret" the ROE that are issued by the CINC, in this case the U.S. Central Command. UNITAF ROE as it existed during Operation Restore Hope stated, armed individuals "may be considered a threat" and "all necessary force" was authorized to disarm them. This same language was adopted by UNOSOM and became applicable to U.S. Forces Somalia. A degree of interpretation is always required to apply ROE to a particular situation. But assume that a local U.S. commander in Somalia entered a village and found ten armed Somalis standing quietly on the street, all of whom had their weapons in slings and pointed to the ground. There is no indication of a hostile act or hostile intent. Does the commander have the latitude to shoot the ten individuals on sight because the ROE states they "may" be a "threat"? Is this not the same as declaring them hostile, the equivalent of wartime ROE? If the commander honestly believes that the only way he can disarm them is to shoot them, is that within the ROE as "all necessary force" to disarm? The example illustrates the fact that if unlimited local interpretation is allowed, the purpose of ROE is lost.

The implementation of Frag Order 39 as part of the JTF Somalia and 13th MEU ROE was more than a mere clarification or interpretation of the ROE. By including all those who carried crew served weapons, it greatly expanded the classification of individuals subject to the use of deadly force "without provocation." The practical effect was to declare those with crew

served weapons hostile. This was a change in the ROE for U.S. forces in Somalia even though it was never formally approved by CENTCOM.[18]

The situation in Somalia raises another question about ROE implementation in U.N. sponsored operations. When the 13th MEU arrived in Somalia they were informed that they would be "governed by UNOSOM ROE."[19] This led to the natural conclusion that changes in UNOSOM ROE, made by the UNOSOM Commander, would automatically apply to the 13th MEU.[20] Frag Order 39 was issued by Lt. Gen. Bir, the UNOSOM commander. But U.S. forces were not under the operational control of UNOSOM, and U.S. ROE in Somalia could properly come only from USCENTCOM. Although the UNOSOM commander was powerless to unilaterally change U.S. ROE, that was not the indication left with U.S. forces in the final months of 1993.

VIII. LESSONS LEARNED

A. ***Complex command relationships make the implementation of ROE difficult.*** When Frag Order 39 was issued by UNOSOM II it was not automatically applicable to U.S. Forces Somalia. U.S. forces were not under the operational control (OPCON) of UNOSOM. For example, the Quick Reaction Force that was an integral part of U.S. Forces Somalia was only available to be used by UNOSOM with the approval of the U.S. Forces Commander, and in accordance with certain "Terms of Reference" between UNOSOM and USCINCENT. Frag Order 39 was nevertheless adopted by U.S. Forces Somalia and promulgated to subordinate commands.[21]

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18 The CENTCOM Staff Judge Advocate (SJA) took the position that the ROE in Somalia did not "change" between 9 December 1992 and 12 January 1994. Nevertheless, the SJA was aware that the "interpretation" contained in Frag Order 39 had been promulgated to U.S. forces.

19 USCINCENT message, *supra* note 9, para 1.

20 Interview with Maj (sel) R. W. Schieke, USMC, 13th MEU Staff Judge Advocate (SJA) (8 July 1994).

21 It should also be noted that Frag order 39 may have only been intended by UNOSOM to apply to a single operation in May of 1993. Phone interview with LTC Dale Woodling, JAGC, U.S. Army, former SJA, U.S. Forces Somalia (10 Aug. 1994).

Multiple command relationships in Somalia between October 1993 and January 1994 created a difficult situation. There were four independent chains of command on the ground in Somalia in late 1993, and the closest common superior for U.S. forces was USCENTCOM, some 8,000 miles away in Florida. This contributed to the ROE change (Frag Order 39) being abruptly withdrawn by USCENTCOM, and two conflicting sets of ROE for U.S. forces. This problem can only be corrected when U.S. forces operate under clear and sensible command relationships that support the local commander and provide for force protection.

U.S. Pacific Command (USCINCPAC) has refined and simplified command and control in JTF operations by a system of "Two-tiered Conops." USCINCPAC, as the primary warfighter, is tier-one, and designated JTF commands, such as COMSEVENTHFLT, report directly to the CINC as tier-two. This concept has been successfully tested in exercises and contingencies. CINCPAC sends a Deployable Joint Task Force Augmentation Cell (DJTAFAC) to augment the JTF staff, and this cell normally includes a judge advocate. The DJTFAC helps ensure the CINC / JTF staff linkage is better focused in terms of the CINC's intent, concept of operations, and rules of engagement.

B. ***Lawyers must take an active role in development and promulgation of ROE.*** Military lawyers are playing an increasingly important role in operations today, providing advice to commanders in operational law. But ROE are under the staff cognizance of the operations staff, and not the SJA.[22] Nevertheless, the legal advisor provides advice and counsel, and must have a thorough understanding of international law and the Law of Armed Conflict. ROE development should be a joint effort of operators, planners, and the legal advisor. Military lawyers should avoid the inclination to bring a "legalistic" or legislative approach to ROE development, always remembering that land forces ROE must be translated into language that can be understood by Marines and soldiers on the ground.[23]

The lawyers responsibility in the field is greater than merely providing legal advice to the commander and his staff. There is a responsibility to ensure that ROE are being constantly and rationally

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[22] ROE are found in Appendix 8 of Annex C (Operations) in a standard Operation Plan.

[23] *See* Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, Vol. 143 Mil.L.Rev. 55.

interpreted within the commander's area of responsibility. This can be difficult, particularly when there are complex command relationships. In Somalia, there was a separate SJA / legal advisor for each of the four commanders, UNOSOM, U.S. Forces, JTF, and Special Operations. This places a premium on coordination and communication across command lines and with the CINC SJA. For example, assume that it comes to the attention of an SJA in the field that a local commander in Somalia has determined that ***all*** armed individuals are a "hostile threat" and that the commander intends to shoot them on sight. The commander needs to be notified that this is excessive in light of the approved ROE. If the matter cannot be resolved locally, the question should be raised officially through the chain of command.

SJAs have a responsibility to communicate with other SJAs in their area of responsibility to ensure that there is consistency in matters relating to ROE. This does not mean that commanders should be denied flexibility in applying the rules in stressful and dangerous situations. Although the SJA reports (and owes his loyalty) to his commander, he still should be communicating with the SJA in the next higher chain of command to ensure that there is consistency in interpretation and application of ROE. Recent history shows that news media are much more aware today of the basic principles of ROE, and they will not fail to ask the right questions.[24] The SJA should be prepared to coordinate staff efforts in this vital area, including operations, plans, public affairs, civil affairs, and psychological operations.

C. ***Changing threat requires a formal change to the ROE***. The escalating threat in Somalia in the summer and fall of 1993 made the existing UNITAF ROE obsolete. The "threat" language of the UNITAF ROE was designed to give commanders the authority to challenge and disarm certain elements of the civilian population. When UNITAF elements were mobile and actively engaged in patrolling, confiscating weapons and moving on the ground throughout the country, the ROE were precisely tailored to the mission. By the end of October 1993, U.S. forces were essentially confined to the airport and UNOSOM / U.S. compounds, and the threat came from armed individuals and crew served weapons firing at aircraft and into the compounds. Nevertheless, no formal change to the ROE was made by CENCTCOM until the message restricting snipers was issued in January 1994.

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[24] Witness the 1994 downing of two Blackhawk helicopters by U.S. F-15's. A central part of the inquiry was the ROE in effect at the time.

In Somalia during the last two months of 1993, local commanders were provided the necessary flexibility in force protection by way of UNOSOM Frag Order 39. Crew served weapons were effectively kept away from the compounds because the gunmen knew they would be shot. This changed when CENTCOM rescinded Frag Order 39 for snipers in Somalia. A formal change to the ROE in October 1993 (or earlier) might have precluded this problem. Commanders and their SJAs need to be able to recognize when ROE no longer meet their needs and must be prepared to aggressively push for new, and effective, ROE through their chain of command.

D. ***Specialized ROE training is essential for OOTW operations.*** Operations Other Than War are characterized by restraint in the use of firepower and violence. This stands in contrast to the wartime environment, which places a premium on aggressiveness once the enemy has been identified. ROE decisions at the tactical level are much more difficult in OOTW. Instant response, junior leader execution, political volatility and local customs add dimensions to ROE not normally encountered in wartime. In Somalia, soldiers and Marines demonstrated a high degree of discipline and restraint throughout the operations. Even though the ROE would have permitted the use of deadly force, U.S. forces often held fire or relied on less violent means. This had the positive effect, at least during the first few months, of maintaining good relations with the community as well as saving many lives.

In training for OOTW, traditional wartime skills such as the return of a high volume of fire immediately when fired upon, must be modified.[25] ROE should be an integral part of rehearsals and the Situational Training Exercise (STX). The U.S. Army 10th Mountain Division, veterans of both Somalia and Haiti, relied on specialized training to provide soldiers with the same situations they would face in OOTW. Integration of functional skills and ROE are emphasized to prepare soldiers to make instantaneous decisions and responses. In a recent article, U.S. Army Major Mark Martins proposes a training model that is designed to provide a standardized package

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[25] A report from U.N. forces in Cambodia cites a relevant example: "Battambang, a freak wind came up. The U.N. team suddenly heard small arms fire breaking out at the far end of town. The U.N. started to call for an extraction, when some of the folks looked outside and saw that the Cambodians were just firing into the air to "stop the wind." That is a normal Cambodian practice. When it's windy, when a storm approaches, they shoot in the air and the wind stops, hopefully." Source: Major G. Steuber, U.S. Army, U.N. Transitional Authority in Cambodia.

applicable to a wide range of circumstances.[26] This provides a single schema of "default" training principles, and could be easily modified to include supplemental ROE if and when they are issued.

E. ***In the OOTW environment, ROE need to be promptly declassified***. In the first months of "Restore Hope" the full text of the ROE were classified secret. Nevertheless, the local population quickly became aware of the application of the rules. In fact, the wide announcement of ROE, as part of a careful Psychological Operations plan, had a strong deterrent effect. For example, technical vehicles were rarely observed on the streets of Mogadishu during the last two months of 1993. If U.S. forces in Mogadishu announce that "anyone observed with an RPG within one mile of the airport will be shot," this will be highly effective in reducing the threat. This of course assumes the military capability and the will to carry out the threat.

In Somalia, the classification of ROE served no useful purpose. There were more than twenty nations that were part of UNITAF or UNOSOM, and it is impossible to maintain "secret" classification for ROE that must be distributed to coalition forces. If early and efficient distribution of ROE is necessary, they must be promptly declassified.

F. ***ROE must be carefully discussed with the media***. In January 1994, media scrutiny of Somalia ROE resulted in an apparent reversal of U.S. Somalia ROE policy. The only approved change in Somalia ROE between December 9, 1992, and January 12, 1994, came in response to bad publicity, not changing threat conditions. When the change of January 12 came, it created the impression (in the field at least) that U.S. ROE were excessive and had to be restricted.

The recent experience of U.S. forces in Haiti has again demonstrated that the media will focus their questions on ROE whenever U.S. forces embark on a major peacetime deployment.[27] When the media asks questions about ROE, military spokesmen need to be prepared to answer their questions. Although this is not normally the duty of the SJA, it is essential that the spokesman consult in advance with the operations staff and the SJA. Where the ROE are classified, that should end the inquiry. Where ROE are properly declassified and distributed, the spokesman should be able

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[26] Note 23, *supra*, at 82.

[27] "*Rules of Engagement for U.S. Forces in Haiti*," L.A. Times, Sept. 27, 1994, at A3.

to speak with authority on the subject. Even when ROE are unclassified, there is a danger that a detailed discussion of the rules by the command spokesman will lead to speculation and misinterpretation.

During Operation United Shield, the operation to support the U.N. withdrawal from Somalia, the Task Force Commander responded to media questions concerning ROE in general terms, stating that the Task Force would respond effectively to any demonstration of a hostile act or hostile intent. He declined to elaborate and was not pressed futher on this subject by the media. This approach would have been preferable to the detailed information given by the UNOSOM spokesman concerning ROE in January of 1994.

IX. CONCLUSION

U.S. operations in Somalia provided a challenging testing ground for rules of engagement in Operations Other Than War. Overall, the ROE were effective and met the needs of commanders, soldiers, and Marines. During the last two months of 1993, ROE in Somalia should have been formally changed to meet the increased threat to U.S. forces. After the tragic loss of two U.S. helicopters as a result of attacks by RPGs, it would have been entirely reasonable to declare individuals with RPGs or crew served weapons, within a specified distance of U.S. facilities and flight routes, as hostile. This would provide the necessary buffer zone to enhance force protection.

The last U.N. forces were withdrawn from Somalia on 2 March 1995. The high expectations of December 1992 gave way to grim reality. Most analysts believe that the U.N. undertook a project that was beyond its resources.[28] The experience in Somalia will have major implications for future unsponsored peacekeeping missions.[29]

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[28] One commentator stated: "Where the peacekeepers . . . turned out to have over-reached themselves was in thinking they could progress from saving lives to remodeling them. The Somalis, not unnaturally, did not choose to be malleable and the remodelers, meeting opposition, were stung by their ingratitude. The U.N. rediscovered what it had previously known: it is hard to impose peaceful, decent behavior against the will of indecent people." Editorial, *The Somali Spectre*, The Economist, Oct. 1, 1994, at p. 20.

[29] *See* Friedman, *U.S. Pays Dearly for an Education in Somalia*, New York Times, October 12, 1993, at pg. 1.

Not all lessons of Somalia have yet been absorbed. The I MEF again assumed the responsibilities of a combined task force command element to support the U.N. withdrawal as part of Operation United Shield. Command relationships were more convoluted than those applicable to UNITAF during the first five months of the intervention. The I MEF at Camp Pendleton, California, is sourced by USMARCENT, in Hawaii. The combined task force reported to CENTCOM through USNAVCENT in Bahrain, an additional layer of control that was absent during UNITAF operations. Unlike the two-tier approach used by CINCPAC, the CENTCOM approach makes staff coordination more difficult.

The final chapter of the international military intervention in Somalia was written in February and March of 1995. The ROE for Operation United Shield contained language that was based on the new JCS Standing Rules of Engagement.[30] The basic rules of self defense, based on hostile act or hostile intent proved adequate and gave commander the necessary flexiblity to properly defend the forces. At the outset, most of the ROE were unclassified, this aided in distribution and coordination with coalition countries.

Lessons learned in Somalia will assist in preparing for the next deployment. The incident of the Marine snipers showed the limits of local interpretation of the rules of deadly force. If ROE are to have any meaning, they must be clear, concise and promulgated in an unclassified format. Concentrated training is essential to ensure that every rifleman understands the rules and knows how to apply them. When a change is required, prompt approval for the change must be sought. This will avoid the development of localized "unofficial" ROE that will not survive careful scrutiny. The ultimate objectives are mission accomplishment and force protection.

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[30] Chairman of the Joint Chiefs of Staff Instruction (CJCSI), *Standing Rules of Engagement for U.S. Forces* 3121.01 of 1 October 1994, Enclosure "A" (unclassified).

A LEGAL REVIEW OF U.S. MILITARY INVOLVEMENT IN PEACEKEEPING AND PEACE ENFORCEMENT OPERATIONS

Colonel James P. Terry, USMC *

I. INTRODUCTION

An evaluation of recent United States' involvement[1] in international crises indicates that very different criteria must be applied to peace operations than to more traditional combatant operations in which United States' interests are directly threatened. This review focuses on our current operational challenges from the U.S. military perspective and explains our emerging criteria for participation in humanitarian and peacekeeping operations.[2]

This evaluation further examines the role of the United Nations as seen in Bosnia, Somalia, and Haiti while dissecting several disturbing actions of the Congress during the last two sessions. Finally, the review looks at some of the lessons learned from those recent operations.

II. OBSERVATIONS ON CURRENT CHALLENGES

The sheer number of recent and ongoing demands for military involvement require we evaluate their merit and review how we might more effectively address these international crises. In addition to the difficult situations in Bosnia, Somalia and Haiti, we are also called upon to assist those in danger in Northern and Southern Iraq where Operations Provide

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1 These recent operations include Operations Restore Hope and UNOSOM II in Somalia, Deny Flight, Provide Promise, Sharp Guard, Able Sentry, and UNPROFOR in the former Yugoslavia, Operations Uphold Democracy and UNMIH in Haiti, and Operation Vigilant Warrior in the Gulf.

2 For a perspective on U.S. criteria for intervention, see Terry, "The Evolving U.S. Policy for Peace Operations," 19 S. Illinois Law J. 119 (Fall 1994).

Comfort and Southern Watch have been extended to ensure the security of minorities from Saddam Hussein's Baathist regime.[3]

In September 1994, the same coalition which participated in Operation Desert Storm was again called upon to blunt aggressive Iraqi activity in southern Iraq on the border with Kuwait.[4] In a massive show of force by U.S., British and French forces, Iraqi Republican Guard divisions were forced to withdraw north of the 32d parallel in Operation Vigilant Warrior. At the same time, USACOM forces, operating facilities at Guantanamo Bay Naval Station and at Quarry Heights in Panama, were coping with a growing Haitian and Cuban migrant influx seeking safehaven from economic and political deprivation.

Last year's challenges, and the ones we are experiencing this year, reflect a new world order which replaced the Cold War political relationships. We are now grappling with military requirements to counter threats that do not challenge our national borders, U.S. citizens, or U.S. interests directly. Each of the contingency operations in which we participated during the past year were conducted in support of a United Nations Security Council mandate, and consistent with our obligations under Articles 25[5] and 103[6] of the U.N. Charter.

Whether in Haiti, Somalia, the former Yugoslavia, or Iraq, the President drew much of his authority to commit U.S. forces from Charter

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3 UNSC Resolution 678, 687, and 688 (1991) continue to provide the authority for coalition efforts to protect the Kurds in Operation Provide Comfort.

4 For an examination of the legal issues related to the earlier Gulf crisis, also applicable here, see James P. Terry, *Operation Desert Storm: Stark Contrasts in Compliance With the Rule of Law*, 41 Naval L. Rev. 83 (1993).

5 Article 25, U.N. Charter provides:

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

6 Article 103, U.N. Charter provides:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

commitments which he himself could influence through votes and U.S. muscle in the Security Council.[7] This was absolutely critical to buttress his Article II authority under the Constitution as none of the foregoing posed a threat to vital national interests or implicated any mutual defense accord ratified by the Senate.

III. EMERGING CRITERIA FOR PARTICIPATION IN PEACE OPERATIONS

The old criteria for commitment of forces found in our national security strategy, as outlined in the Defense Planning Guidance and Contingency Planning Guidance[8], may not be relevant when addressing peace operations. Even as recently as Operation Desert Storm, we could look as a nation to our mutual self-defense relationship with Kuwait under customary rules of self-defense as well as Article 51 of the U.N. Charter in responding to the Iraqi attack on an ally.[9] Our more recent involvements, however, in Rwanda, Somalia, Haiti, and Bosnia were predicated upon a United Nations' call for assistance, with no corresponding threat to vital U.S. interests or those of an ally.

In each of these latter crises, we examined the situation under criteria established in the publication of Presidential Decision Directive 25 in May 1994.[10]

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7 As a permanent member of the U.N. Security Council, the President, through his U.N. Ambassador, has significant weight in shaping decisions within that body. See U.N. Charter, Art 23(1).

8 Published by the Secretary of Defense every five years (current version FY 1996-2001), the Defense Planning Guidance (DPG) describes the roles of U.S. military power in supporting the President's national military strategy. The Contingency Planning Guidance (CPG), published yearly by the Secretary, ensures that planning is consistent with national strategy.

9 See James P. Terry, *Operation Desert Storm: Sharp Contrasts In Compliance with the Rule of Law*, 41 Naval L. Rev. 83 (1993) for a full discussion of our authority under the U.N. Charter to intervene on behalf of Kuwait after the attack by Iraq.

10 Presidential Decision Directive 25, 4 May 1994, "Reforming Multilateral Peace Operations."

To its credit, this Administration has required we revise the old criteria of the bi-polar Cold War world where our National Military Strategy centered on defense of vital national interests. While the National Military Strategy clearly emphasizes that the fundamental purpose of the Armed Forces remains to fight and win our nation's wars, we also recognize that the military has an important and decisive role in other operations including peacekeeping, peace enforcement, and certain humanitarian crises.

Our new strategy centers on the accomplishment of two fundamental military objectives: promoting stability and thwarting aggression. We define three sets of military tasks to accomplish these objectives: "peacetime engagement," "deterrence and conflict prevention," and "fight and win." The first two sets of tasks relate directly to our role in peace operations. Through this National Military Strategy of "flexible and selective engagement," the United States can work cooperatively to preserve the peace in areas of instability or unrest, restore the peace in areas of conflict, reduce the impact of regional strife, and curtail human suffering.

The implementation of the new strategy in PDD-25 reflects the U.S. Government's soul searching in the aftermath of our experience in Somalia, just as the earlier Weinberger Doctrine arose from the soul searching which followed the Beirut bombing in October 1983. In fact, the criteria formulated by Secretary Weinberger for U.S. military response to crises abroad were largely adopted by President Clinton in PDD-25.

The criteria for our support under PDD-25 and our vote in the Security Council for a proposed peace operation requires that we first ask whether the situation represents a threat to international peace and security. Second, does the operation as proposed by the Secretary General have a defined scope with clear objectives. Third, is there an international community of interests to deal with the problem on a multi-lateral basis. Fourth, if a Chapter VI peacekeeping operation is contemplated, is there a working cease-fire in effect. Fifth, are financial and human resources available. Finally, is there an identifiable end-point[11].

When the commitment of U.S. forces to a U.N. contingency is considered, the Interagency will ask whether the peace operation advances U.S. interests; whether personnel, funds, and resources are available;

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[11] PDD-25 is classified. An unclassified White Paper prepared by the Department of State carefully records these criteria. It is entitled "The Clinton Administration's Policy on Reforming Multilateral Peace Operations," DOS Pub. 10161, May 1994.

whether U.S. participation is necessary for the operation to be successful; whether an end-point for U.S. participation can be identified; whether congressional and domestic support exists; and whether command and control arrangements are acceptable[12]. Satisfactory responses to each of these inquiries is critical to successful U.S. involvement.

Finally, when the use of force is contemplated in those circumstances where significant numbers of U.S. personnel are committed, Presidential Decision Directive 25 requires we ask whether we have the ability to commit sufficient forces to achieve the defined military objectives, whether the leaders of the operation have a clear intention to decisively achieve the stated objectives, and whether there is sufficient commitment on the part of the U.N. or other sponsoring body to continually reassess and adjust the objectives and composition of the force to meet changing security and operational requirements[13]. Although these criteria were articulated for U.N. operations and other coalition efforts where direct challenges to U.S. vital national interests are not present, they offer prudent guidance for all U.S. commitments of forces.

IV. U.N. INEPTITUDE

The development of PDD-25 resulted from the confluence of two parallel processes. The first involved the increased power and influence of a newly unified United Nations Security Council[14] and its resultant vigor in addressing breaches of international peace and security—often without the required expertise or assets. The second strand reflects a Congress increasingly wary of U.S. participation in U.N. and other coalition activities without clear safeguards applied.

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12 Command and control arrangements ensuring that U.S. personnel are always under U.S. or NATO operational command when engaged in Chapter VII efforts to redress breaches of the peace remains the critical concern of the Congress.

13 Many believe the Beirut bombing incident in 1983 and the attack on U.S. personnel in Somalia in June 1993 are watershed events which have shaped our thinking concerning the need to continually reassess security requirements in a changing operational environment.

14 Article 27 of the U.N. Charter requires a vote of nine of the 15 members, including all five permanent members, to reach a decision concerning a breach of the peace. Russia and China are permanent members, along with Great Britain, France and the U.S.

Until the internal disintegration of the Soviet Union in 1990-1991 and the events in Tianamen Square in the People's Republic of China, those two permanent members of the Security Council were unwilling to support or vote for involvement by U.N. peacekeeping or peace enforcement forces in areas of the world in which they had regional or military interests.

During his campaign for President of Russia in 1991, however, Boris Yeltsin committed to voting for Security Council initiatives which would support democratic principles. His current concern with continued U.S. financial assistance should ensure that Russia will not act unreasonably in that forum. Similarly, the events in Beijing related to Tianamen Square had the effect of causing the People's Republic of China to be extremely careful in their actions in the United Nations and elsewhere lest they risk "most favored nation" treatment by the United States.

As a result of this newly effective Security Council, the United States is faced with some very significant concerns. The requirement to address international crises through United Nations' mechanisms[15] has imbedded within it many problems which were unforseen by U.S. leaders at the end of the Cold War and as late as the break-up of the former Soviet Union in 1991. The most significant of these may be the lack of an effective operational capability within the U.N. Department of Peacekeeping Operations.

Without an operations center at the U.N. that can fuse information / intelligence and capabilities into effective military planning, this operational requirement must be largely "contracted" out. Further, with no cadre of experienced military advisors and planners available to the Secretary General, the United Nations is at the mercy of its more affluent and experienced members for military leadership. And with no intelligence-gathering capability, either human or electronic, and no access to overhead satellite systems that could provide real-time intelligence, the United Nations is only able to consider the information which its more sophisticated member States are willing to share. Of similar concern is the U.N.'s lack of an in-house logistics capability. The support requirements of an operation undertaken at great distances from the contributing States can pose staggering costs, and member States are reluctant to provide sustainment for

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[15] The U.N. Charter, as a binding international treaty ratified by each of its members, creates clear unavoidable obligations on U.N. Member States through Articles 25 and 103 of the U.N. Charter. These articles obligate Members to support Security Council resolutions and abide by their dictates.

large operations such as UNPROFOR in the former Yugoslavia or UNOSOM II in Somalia even with U.N. reimbursement.

Finally, even if an operation is fully funded with adequate logistics support, very few States have militaries or officer corps with recent experience in planning and executing sophisticated operations. Moreover, effective artillery-infantry coordination in an era of highly mobile forces requires the most modern communications, not to mention an understanding of close air support and the air-ground coordination which must be integral to that tactical air support. It is because of the lack of focus on the part of the U.N., especially in Somalia, on these and other obvious requirements that the U.S. Congress has begun to place significant restrictions on U.S. participation in U.N. peace operations.

V. CONGRESS AND PEACE OPERATIONS

The loss of Pakistani lives in Somalia in June 1993, and then the further loss of 18 U.S. lives in Mogadishu in October 1993[16] may have brought about the death knell for U.S. support for U.N. peace operations brought under Chapter VII of the U.N. Charter—unless led by U.S. officers and with a preponderance of U.S. forces. In passing the Byrd Amendment[17] to the FY-94 Defense Appropriations Act, the Congress sent a strong message that the President's enhanced authority to deploy forces without Congressional approval in circumstances where no vital U.S. national interest is implicated (derived from a newly-effective Security Council) was not unlimited. Using the power of the purse, the Congress would limit the expenditure of Defense funds where they determined U.S. interests were not well served. When the Byrd legislation lapsed on 30 September 1994, the Congress quickly passed the Kempthorne

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16 The capture of CWO Durant and the U.N. inability to control the situation in Mogadishu may have been the final straw for the U.S. Senate in passing the Byrd Amendment limiting U.S. funding.

17 The Byrd Amendment, section 8156 of the FY 94 Defense Appropriations Act, provided that any funds appropriated for DOD may be obligated for expenses incurred only through March 31, 1994, for "the operations of United States Armed Forces in Somalia."

Amendment[18] to the FY 95 Defense Authorization Act which continued funding limitations.

The Congress likewise showed itself entirely willing to dictate to the President when it considered that he was not doing enough in a peace enforcement effort. Senator Dole, leading the charge, attempted to legislatively compel U.S. actions to lift the arms embargo unilaterally for the Bosnian Muslims in early 1994 and thus violate the U.N. Resolution establishing the arms embargo. Senators Nunn and Mitchell, attempting to moderate this effort through compromise, drafted the Nunn-Mitchell Amendment to the FY 95 Defense Authorization Act. This provision, which was enacted, does not lift the arms embargo unilaterally, but rather precludes U.S. enforcement against the Bosnian Muslims while continuing our obligations as they relate to the other parties to the conflict[19]. Even though not as severe as Senator Dole's proposal, this Amendment may well contribute to an earlier-than-planned withdrawal from Bosnia by UNPROFOR.

In two other initiatives, the Congress has sought to interject itself in military affairs long thought the sole province of the President. In S.5, the "Peace Powers Act"[20] and in H.R. 7, the National Security Revitalization Act[21] (NSRA) (part of the "Contract With America" (CWA)) in the House,

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18 The Kempthorne Amendment, although less onerous than the Byrd Amendment, restricted funding for U.S. military personnel in Somalia on a "continuous" basis after 30 September 1994.

19 The Nunn-Mitchell Amendment also provides specific direction in paragraph (f)(1)(B) for the President to submit a plan to Congress on the manner in which the Bosnian Army would be trained by U.S. and allied forces outside Bosnian territory. The Amendment, however, must be read in light of UNSC Resolution 713 which "calls upon all States to refrain from any action which might contribute to increasing tension or impeding or delaying a peaceful and negotiated outcome to the conflict in Yugoslavia." Implementation of this training would likely be viewed as making the U.S. a party to the conflict.

20 The Peace Powers Act would eliminate the War Powers Resolution's 60 day clock; would severely limit the payment of assessments to the U.N. for peacekeeping; would require 15 days advance notification to Congress before voting in the UNSC on peacekeeping; and would preclude foreign command of U.S. forces.

21 The NSRA would, in part, demand credits against our CIPA assessment for voluntary activities; would limit the use of DOD funds for U.N. peacekeeping activities; would restrict sharing of intelligence with the U.N.; and would add significant restrictions

the Congress is attempting to unconstitutionally restrict the President's authority as Commander-in-Chief and severely limit U.S. involvement in future peace operations.

In the Peace Powers Act, Senator Dole's initiative would prohibit U.S. forces from serving under foreign operational control, even where it may be in our interest as in Desert Storm. Similarly, in the National Security Revitalization Act of the CWA, Speaker Gingrich's bill would limit the use of DOD funds for U.N. peacekeeping activities and restrict sharing of intelligence with the U.N. In each case, the President's Constitutional prerogatives would be severely impacted. While the Republican Congress will continue to demand accountability in Presidential decision-making as it relates to the U.N., there is a bi-partisan concern that the President must exercise more care in his stewardship regarding peace operations.

VI. OPERATIONAL LESSONS OF RECENT PEACE OPERATIONS

Just as the Congress and the U.N. have been focal points for debate concerning the challenges of peacekeeping and peace enforcement, the operations themselves have provided many insights into U.S. strengths and weaknesses in participating in these operations. When Saddam Hussein massed his Republican Guard Divisions on Kuwait's border in September 1994, for example, our post-Desert Storm defense strategy was immediately put to the test.

Operation Vigilant Warrior which followed was an excellent test of our ability to deploy forces rapidly to Southwest Asia. We learned quickly that our pre-positioned stocks must be packed for efficient break-out—both ashore and afloat. We reconfirmed that timely indications and warning (I & W) of Iraqi movements and intentions are essential. We also affirmed the need to build and maintain relationships and understandings among regional States such that bed-down of aircraft and overflight rights are secured in advance.

In reviewing our Somalia experience, other issues surfaced. U.N. leadership in UNOSOM II proved inadequate to enforce the mandate of that

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and reporting requirements on placing American forces under U.N. operational control.

operation brought under Chapter VII[22] of the U.N. Charter. This was largely because the mission—which was heavily tied to nation building—was simply too ambitious, especially where Somali leaders were unwilling to commit to the nation building process. The Chairman, General Powell, and USCENTCOM, General Hoar, had recognized the need to carefully circumscribe the mission to that which was achievable during the preceding UNITAF Operation. They had limited that effort to humanitarian relief. Unfortunately, the U.N. had not learned the same lesson.

The crisis in the former Yugoslavia brings with it the most complex series of issues[23]. The first relates to the understanding that outside powers will not and cannot impose a settlement—that it must come from a willingness of the warring parties to reach an accord. We can only create the conditions where an agreement may be possible. The second reality relates to an understanding of the importance of "containment." Critics of NATO and the United Nations may be setting their sights too high. One only has to remember the failure of containment in 1914, when events in Bosnia ignited first the Balkans and then all of Europe to appreciate that truism.

For the United States in the Balkans, it can be argued that we have only two vital national interests. The first involves preventing the conflict from spreading beyond the region, and the second, arguably, the preservation of NATO and the U.S. role in Europe. Of course we have other, but not vital, interests. These include the limitation of human suffering and the promotion of a negotiated settlement.

We must also not forget that a negotiated settlement must offer realistic parameters. In fact, the mechanistic percentage formulation (51-49) offered by the Contact Group may be setting too high a barrier to

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22 Chapter VII includes Articles 39-51 of the Charter, relates to peace enforcement, and authorizes "all necessary means."

23 The United States is involved in each of the five (5) military operations presently underway in Bosnia and we have the largest total commitment of any country in that theatre. We have significant aviation assets committed to Operation Deny Flight over Bosnia, warships committed to Operation Sharp Guard in the Adriatic, a hospital unit assigned to UNPROFOR in Croatia, an infantry unit assigned to Operation Able Sentry in Macedonia and a large contingent and headquarters staff assigned to manage Operation Provide Promise. Operation Provide Promise manages the humanitarian relief effort for all of Bosnia and other areas of the former Yugoslavia where great humanitarian need exists.

acceptance. We, as Americans, must understand what each side wants, and why, if we are to assist in obtaining a resolution to this crisis. For example, the Serbs want the Posavina Corridor to ensure the respective areas under their control are interconnected. The Bosnian Muslims, conversely, want their enclaves to be preserved as a series of Gaza Strips. While any solution must consider both perceived requirements, it need not give both parties everything. That may be one of the greatest lessons of Bosnia.

Each of these crises, including the current UNMIH operation in Haiti, is far from a complete success. However, in each instance, successful aspects of these international initiatives have been closely tied to careful planning, effective leadership, an appreciation of the real interests of each of the competing factions and a clear understanding of what the force committed by the international community is actually capable of achieving.

VII. CONCLUSION

The lessons from our recent peace operations are clear. The rigor of the PDD-25 process is absolutely essential if the United States Government is to continue to receive Congressional support for these operations in which vital national interests are not directly threatened. Equally important, we cannot expect the Congress or the American people to continue to be supportive of U.S. involvement if we continue to carry the bulk of the international requirement.

We must also recognize that the United Nations may not be the anticipated panacea for any but the most elementary initiatives under Chapter VI of the U.N. Charter. In that regard, U.N. limitations in the areas of command and control, logistics capability, intelligence, and organic airlift must be recognized and corrected if the U.N. is to have a significant international role in peace enforcement. Finally, we must consider that a more effective alternative to U.N. involvement, already anticipated in Chapter VIII of the U.N. Charter, may be the forces of regional organizations such as NATO, the OAS, ASEAN and the OAU.

THE USE OF FORCE AGAINST THIRD PARTY NEUTRALS TO ENFORCE ECONOMIC SANCTIONS AGAINST A BELLIGERENT

Lieutenant Todd A. Wynkoop, JAGC, USN *

I. INTRODUCTION

In the five years since the start of the new decade, the United Nations has been increasingly willing to exercise its power to impose economic sanctions[1] in order to maintain world peace.[2] The initial consensus of that world body to crises in Iraq, Bosnia-Herzegovina, and Haiti was to impose economic sanctions for violations of fundamental principles of international law.[3]

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1 The United Nations Charter explicitly vests sanction power in the Security Council:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations of rail, sea, air, postal, telegraphic, radio, and other means of communication, and severance of diplomatic relations. U.N. Charter art. 41,

2 *See, e.g.*, R.C. Longworth, *Sanctions Sound Good, But Effect Is Minimal*, Chicago Tribune, Jul. 31, 1994 at C1 ("The United Nations . . . has used economic sanctions four times as often in the last four years as it did in the first 45 . . . .").

3 The most significant exercise of United Nations' sanction power remains the Security Council's action to impose economic sanctions against Iraq in the wake of that country's August 1990 invasion of Kuwait. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg., U.N. Doc. S/RES/661 (August 6, 1990). The United Nations also imposed long term economic sanctions against Serbia and Montenegro as a reprisal for Serbian supported actions by the Serbian population in Bosnia. S.C. Res. 757, U.N. SCOR, __th Sess., _____ mtg., U.N. Doc. S/RES/757 (May 30, 1992); *see also*, G-7 to Increase Pressure Against Serbian Forces, Wall St. Journal, Jul. 7, 1992 at A2, col. 2; Leaky Sanctions, Time, Nov. 30, 1992 at 47. John F. Burns, Croatia Asks Western Action in Bosnia, N.Y. Times, Dec. 13, 1992 at 24; Britain Maintains Opposition to Armed Intervention in Bosnia, Agencie France Presse, Aug. 8, 1992.

The United Nations' Security Council's recent economic sanction decisions have included a relatively new dimension, however; forcible maritime enforcement. During the Iraqi occupation of Kuwait, the Security Counsel specifically authorized the use of force to ensure compliance with the sanctions imposed by Resolution 661.[4] Similar actions were authorized in Serbia, where NATO Maritime forces are deployed to enforce the sanctions,[5] and Haiti, when international forces were dispatched to enforce the United Nations' sanctions against that country.[6]

Countries enforcing sanctions on behalf of the United Nations have thus far avoided serious confrontations during those multi-national enforcement actions. At times, such confrontations seemed imminent,

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Finally, the United Nations supported United States' efforts to use economic sanctions to undermine the control of the military junta which had deposed Haitian President Jean Bertrand Aristide. S.C. Res. 917, U.N. SCOR, __th Sess., _____ mtg., U.N. Doc. S/RES/917 (June 8, 1994). Such use of economic sanctions is not new, but rather, it reinforces the historical use of economic coercion against aggression. For examples of previous use of sanctions see S.C. Res. 217, U.N. SCOR, 20th Sess., 1265th mtg. U.N. Doc. S/RES/217 (1965) (calling upon states to voluntarily apply economic sanctions against Rhodesia); S.C. Res. 2537, U.N. SCOR, 23d Sess., 1428th mtg. U.N. Doc. S/RES/253 (1966) (imposing mandatory sanctions against Rhodesia); see also Gary Clyde Hufbauer, Jeffrey J. Schott, and Kimberely Ann Elliott, Economic Sanctions Reconsidered xix-xxiii _____ (providing inclusive list of previous instances of economic sanctions); see generally J.P. Hayes, Economic Effects of Sanctions on South Africa 1987; Donald L. Losman, International Economic Sanctions 1979.

4 Resolution 665 of the Security Council called upon, "those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the security council to halt all inward and outward maritime shipping. . . ." S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg., U.N. Doc. S/RES/665 (1990).

5 *See, e.g.*, State Department Briefing, Federal News Service, (Mar. 19, 1993) (reporting NATO and Western European Forces operating under auspices of U.N. Resolution 757 challenged 7,462 ships, boarded 420 of those, and diverted 105 vessels carrying suspicious cargo and also reporting United States sent patrol boats to Romania and Bulgaria for use in sanctions enforcement).

6 S.C. Res 917, *supra* note 3 (permitting member states to "use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Counsel to ensure strict compliance"); *see also Tightening the Screws*, McNeil-Lehrer Newshour, Transcript #4947 (June 10, 1994) (reporting on actions of 12 ships from United States, Canada, and Argentina stationed off Haitian coast to enforce sanctions).

however,[7] and raised several important issues regarding the use of maritime force in conjunction with economic sanctions. Specifically, though the Charter empowers the Security Council to authorize force against a belligerent, is force an appropriate measure to coerce a third party state to honor the sanctions? Further, can an individual nation impose and enforce sanctions? Although the enforcement of sanctions against Iraq, Haiti, and Serbia have not provided a dispositive resolution to any of these issues,[8] settlement remains imperative in light of the escalating use of economic coercion in the name of world peace.

This article will discuss the issues involved in the maritime enforcement of economic sanctions. It will first analyze the legal grounds for imposition of economic sanctions: collective security action by the United Nations and action based on collective self-defense. Second it will discuss the legitimacy of force under each of these grounds. Finally, it will evaluate two alternative frameworks for assessing the use of force to compel compliance with economic sanctions. It will argue that the doctrinal approach of customary law fails to create a useable paradigm and that a functional approach to use of force is better suited to contemporary concerns about the use of force to compel compliance with maritime sanctions.

II. RATIONALES FOR ENFORCEMENT OF ECONOMIC SANCTIONS: THE BASIS FOR IMPOSING SANCTIONS

A. The United Nations' Charter explicitly authorizes the Security Council to impose economic sanctions to maintain international peace and security.[9] Further, Articles 39 and 42 provide the Security Council with broad discretion to determine the need to use force to prevent

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7 *See, e.g., U.S. Warship Fires Warning at Iraqis,* N.Y. Times, Aug. 19, 1990, at A11 (reviewing U.S. actions to stop Iraqis violations of the sanctions).

8 Confrontations did not occur in these cases for a number of reasons. In many cases, confrontation was avoided because vessels capitulated rather than challenge the sanctions enforcers.

9 *See* U. N. Charter art. 41, *supra* note 1 (providing full text of Article 41).

a threat to international peace and security.[10] They contain no limitations on Security Council authority except the permanent member veto and the provisions of Article 24(2), which requires that Security Council action be consistent with the principles of the United Nation's Charter.[11] Additionally, Articles 39 and 42 imply that force may be used to prevent a perceived threat from occurring. As a result,

> [t]he extension of the enforcement powers of the Security Council to cover preventive as well as remedial action means that provided there is great power unanimity and adequate support from other members, the Council can designate any situation as a threat to the peace. . . .[12]

Therefore, once the Security Council determines a threat to peace exists, economic sanctions, including forcible compliance measures, are included within the Article 42 grant.[13]

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[10] Article 39 provides:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. U. N. Charter art. 39.

Article 42 provides:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations. U. N. Charter art. 42.

[11] U. N. Charter art. 24(2). *See also* U. N. Charter art. 1 (containing the ambitious principles of the Charter which include maintaining peace and security, developing friendly relations, and achieving cooperation in solving human rights problems).

[12] Margaret Doxey, Economic Sanctions and International Enforcement 83 (1980).

[13] Under a formalistic approach to collective security, the Security Council must complete a hierarchy of actions. First, a threat must be declared; then economic sanctions must be imposed; and, finally, force may be authorized. *See, e.g.*, David J. Scheffer, Commentary on Collective Security in Law and Force in the New International Order 103 (Lori Damrosch & David Scheffer, eds., 1991).

B. Self-defense and collective self-defense.

For nations acting independently of the United Nations, Article 51 of the Charter specifically recognizes the inherent right of self-defense, including the right of collective self-defense, despite the collective security measures of the Charter.[14] Unlike Article 41, however, Article 51 does not contain an explicit authorization for economic sanctions. Consequently, the legality of sanctions depends upon the nature of the inherent right of self-defense recognized by Article 51.

The legal bounds of the right of self-defense may be debatable,[15] but they are of central importance to validating sanctions in the absence of United Nations' approval.[16] Definition of the right depends, to a large extent, on the construction given the collective security agreement embodied in the U.N. Charter.[17] Scholarly discourse on the collective security

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14 Article 51 of the U. N. Charter reads:

> Nothing in the present chapter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security.

15 Debate over the self defense provisions of the United Nations Charter is not new and is, in many ways, a recapitulation of the original debates during the drafting of the Charter. *See* Belatchew Asrat, Prohibition of Force Under the United Nations Charter: A Study of Article 2(4) 202-06 1991 (providing a good discussion of the debates over the extent of the right of self-defense).

16 A Security Council resolution authorizing force based on Article 51 creates a parallel situation with an authorization under Article 42 because it is sanctioned by the United Nations. Fundamentally, it is the ratification itself, not the basis, that is significant to the third party actor.

17 W. Michael Reisman, *Allocating Competence to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, Law and Force in the New International Order 26 (Lori Fischer Damrosch & David J. Scheffer, eds., 1991) (comparing this agreement to the social contract whereby citizens abandon their self-enforcement

agreement covers a broad range of views that include an unequivocal grant of self-defense to the collective judgment of the Security Council—even in the face of Security Council vote for inaction[18]—and a more limited view that allows a state to act in self-defense until the Security Council acts.[19] The overwhelming number of international law scholars, however, support some variation on the first, broader view of the right to self-defense. As these scholars point out, the unequivocal view of the collective security arrangement is inappropriate because it fails to provide protection for the victim state in many instances.

Additionally, the text of Article 51 permits a state to use force in self-defense "until the Security Council has taken measures necessary to maintain peace and security."[20] While Article 51 is silent on who determines whether the measures taken are sufficient to satisfy the clause,[21] the provision's active tense indicates that the triggering mechanism for the loss of the inherent right of self-defense is action. Security Council inaction, whether the result of a failure to address the issue or a Security Council veto, is insufficient to trip the collective security agreement.

A second approach to the interrelationship of Article 2(4) and Article 51 concentrates more appropriately on the language of Article 51 which permits self-defense until the Security council takes action.[22] Under this

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rights of the benefits of police protection).

18 *See, e.g.*, Mary Ellen O'Connell, *Enforcing The Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait,* 15 S. Ill. U. L.J. 453, 478 (1991).

19 *See, e.g.*, Adam Chayes, The Use of Force in the Persian Gulf in Law and Force in the New International Order 5 (Lori Fischer Damrosch & David J. Scheffer, eds., 1991).

20 Charter art. 51; *see supra* note 14.

21 *Id.*

22 *See, e.g.*, Oscar Schachter, *United Nations Law in the Gulf Conflict,* 85 Am. J.Int'l L. 452, 458 (1991) (using the intent of the Security Council as the determining factor); *see also* Y. Dunstein, War, Aggression and Self-Defense 196-97 (1988).

textual theory,[23] the right of self-defense exists until the Security Council takes affirmative action to oppose the threat.[24] At this point, all unilateral action based on self-defense must cease.

While this view better addresses the practical realities of current events, even this moderate approach fails to fully address the practical difficulties that arise in self-defense situations. Under such an approach, the Security Council may still terminate the self-defense right without adequately protecting the right of the victim state. The recent Gulf War provides a useful example.

The Security Council's authorization of economic sanctions against Iraq[25] satisfied the textual definition of Article 51's "action" requirement, but the action did little to alleviate the threat to Kuwait. In fact, the limited impact of the sanctions prompted the Security Council, led by the United States and its allies, to authorize military action.[26] Assuming that the subsequent military action was not authorized, the textual approach to Article 51 would have prevented any unilateral military action despite Iraq's attacks on Kuwaiti civilians and property.

A broader view of self-defense under Article 51 relies upon the functional nexus between the collective security compact and the effectiveness of the United Nations in alleviating a threat.[27] Failure of the

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23 Proponents of this approach are classified as "realists. *See* Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Interests*, Law and Force in the New International Order 186 (Lori Damrosch & David Scheffer, eds., 1991).

24 Eugene V. Rostow, *Agora: The Gulf Crisis in International and Foreign Relations Law Continued: Until What? Enforcement Action or Collective Self-Defense*, 85 Am. J. Int'l L. 506, 512 (1991).

25 *See supra* note 3 and accompanying text (discussing Resolution 661).

26 *See supra* note 4 and accompanying text (addressing Resolution 665).

27 Asrat, *supra* note 15 at 44; *but see* J.N. Singh, Use of Force Under International Law 90 (1984). Asrat notes that:

> Such functional inseparability would imply the effective functioning of the supporting infrastructures, for otherwise the ***jus cogens*** norm would cease to command the respect that is inherently necessary for

Security Council action to relieve the threat, vitiates the collective security agreement, and fails to discharge the inherent right of self defense under Article 51. Thus, the Article 51 right of self-defense is only terminated when the Security Council's actions actually restore peace and security.[28]

A useful framework for evaluating the legality of actions justified as self-defense independent of the United Nations' collective security agreement is one akin to the analysis of the reach of Presidential Power discussed by Justice Jackson in his concurrence in *Youngstown v. Sawyer*.[29] Under that framework, Article 51 authority reaches its apex when the Security Council expressly authorizes the self-defense action[30], attains a middle ground absent Security Council action, and descends to its minimum when it is exercised counter to a specific Security Council pronouncement.[31] Thus, the use of force in conjunction with economic sanctions based on self-defense would not be illegal solely because the Security Council failed to ratify the use of force.

> the continued maintenance of its privileged status. . . . It would not therefore appear feasible to deny the existence of a conditional relationship between the effective functioning of the collective measures under Chapter VII of the Charter and the continued validity of Article 2(4).

28 Francis V. Russo, Jr. Targeting Theory in the Law of Armed Conflict at Sea: The Merchant Vessel as Military Objective in the Tanker War in The Gulf War of 1980-1988 161 (Ige F. Dekker & Harry H.G. Post, eds., 1992); *see also* Richard Gardner, Commentary on the Law of Self-Defense in Law and Force in the New World Order 50-51 (Lori Fischer Damrosch & David Scheffer, eds., 1991) (discussing this approach as the proper textual interpretation of Article 51).

29 343 U.S. 579 (1952); *see* Chayes, *supra* note 19, at 7 (advancing this analogy). The author agrees with Professor Chayes analogy for evaluating the legitimacy of unilateral action under the Charter, but contends that independent action under Article 51, represented by the middle or lower category, is much broader. *See supra* notes 27-28 (discussing a right of self-defense that exists until the Security Council successfully restores order).

30 For example, the Council adopted Resolution 661 during the Persian Gulf War despite the collective self-defense claims of the United States and the United Kingdom, so, "[w]hile the Council's affirmation of the right of collective self-defense was not legally required, it served to bolster the case for naval action against Iraq to enforce the embargo. Schachter, *supra* note 22, at 458.

31 *Id.* at 634.

C. Self-defense under International Law

Even though the right of self-defense preserved in Article 51 is broad enough to generally support the use of force while administering sanctions, such action must still satisfy specific parameters of self-defense established by international law. The International Court of Justice (I.C.J.) defined the prerequisites for self defense actions in *United States v. Nicaragua*.[32] First, the right of self-defense only arises in response to an "armed attack." Second, the force used in self-defense must be necessary and proportional. Third, the right to self-defense terminates concurrently with the cessation of the threat and, fourth, the Security Council can preempt the action. If forcible compliance with economic sanctions satisfies these conditions, it is valid.

One notable distinction exists between sanctions imposed by the United Nations and those based on a collective self-defense theory. The United Nations' Charter requires all member states to assist, or at least to avoid interfering, in United Nations approved collective security measures.[33] No parallel provision, beyond classification as an opposing belligerent under the laws of war, requires any member state to honor unilateral action taken by any nation in self-defense. Some degree of universality is an indispensable component of economic coercion and the unilateral approach to sanctions may be inadequate in this regard. As a result, unilateral sanctions may prove ineffectual in a practical sense and the degree of compliance with economic sanctions will largely be a function of the imposing state's ability and willingness to confront violators of the sanctions.

The consequence of this distinction decreases if support of unilaterally imposed measures includes a majority of the United Nations' membership or the bulk of the industrialized countries. Sanctions imposed

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32 Nicaragua v. United States, 1986 I.C.J. 14. To ease discussion, this article will accept the Nicaragua standards. *See* Anthony D'Amato, *Trashing Customary International Law*,. 81 Am. J. Int'l L. 101 (criticizing the decision and characterizing the I.C.J. judges as naive); *but see* Herbert W. Briggs, *The International Court of Justice Lives Up to Its Name*, 81 Am. J.Int'l L. 78 (applauding the I.C.J. decision).

33 U. N. Charter art. 2, ¶ 5.

under either of these conditions will create ample economic pressure regardless of Security Council action.[34]

III. USE OF FORCE AGAINST A NON-BELLIGERENT TO ENFORCE ECONOMIC SANCTIONS UNDER TRADITIONAL INTERNATIONAL LAW

The effectiveness of economic sanctions hinges on the existence of some mental or physical mechanism to ensure compliance by third parties. Although nations may have various means of constraining third parties, such as diplomatic and trade pressure, in many cases the only effective method may be force.[35] The problem is determining when forcible actions against a non-belligerent are lawful to enforce economic sanctions. Decision-makers may base those determinations on existing principles of existing international law, or an alternative approach.

A. The traditional approach to use of force decisions

The current approach to use of force decisions is based upon customary international law as modified by the provisions of the United Nations' Charter. The law of armed conflict is a combination of customary and treaty-based international law principles that define the legal limits of waging war.[36] Traditionally, it focused on the methods of warfare and the treatment of prisoners.[37] As modern warfare began to take a greater toll on

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[34] Majority support of a sanctions provision that fails because of a permanent member veto may also provide weighty legal validity. *See* W. Michael Reisman, *The Legal Effect of Vetoed Resolutions*, 75 Am. J. Int'l L. 904, 906 (1980).

[35] The mechanism may be force or merely the threat of force. *See generally* Romana Sadustka, *Threats of Force*, 82 Am. J. Int'l L. 239 (1988) (examining the role of threats of force in international relations).

[36] *See* Hilaire McCoubrey & Nigel D.White, International Law and Armed Conflict 189 (1992).

[37] *Id.* at 189-90.

the civilian population, the law of armed conflict expanded to encompass more general humanitarian concerns.[38]

The traditional laws of armed conflict establish restrictive standards on the conduct of war and attempt to strike a balance between a belligerent's right to stop an enemy's trade and a third-party state's right to free trade.[39] The law of armed conflict currently addresses this situation through a presumption of unfettered neutral trade, limited only by three doctrinal exceptions: the principle of blockade, the law of contraband, and the concept of unneutral service.[40] Accordingly, a traditional justification for the use of force in conjunction with economic sanctions must rely on one of these doctrines of exemption.

1. The Law of Blockade

A classic blockade requires a declaration by the blockader that describes the area and extent of the blockade, effective enforcement of the blockade, and impartiality in enforcement.[41] The blockade enforcer enjoys certain rights and bears certain obligations under the classical approach.[42] Any ship that approaches a blockade is subject to a lawful visit and search by forces of the belligerent. A ship approaching the blockade and carrying cargo destined for the target state[43] that fails to turn away from the

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38 *See, e.g.*, G.I.A.D. Draper, Humanitarianism in the Modern Law of Armed Conflict in Law and Force in the New International Order 20 (Lori Damrosch & David Scheffer, eds., 1992) ("At the end of the day, the perpetual quest for a balance between military requirements and humanitarian dictates remains. The balance is not easy to attain").

39 *See* J.A. Hall, The Law of Naval Warfare 183 (1921) (examining the conflicts involved in economic warfare).

40 *Id.* at 186.

41 *See* Howard S. Levie, The Code of International Armed Conflict 164-68 (1986) (incorporating the various sources of armed conflict law into a single code).

42 *See* Hall, *supra* note 39, at 203-07.

43 The law of continuous voyage developed as an attempt to clearly define the scope of a blockade. Basically, it extended the use of the blockade to cover any ship whose cargo was ultimately destined for the target state regardless of the actual destination of the ship carrying the cargo. *See* Robert W. Tucker, International Law

blockade may be captured. If such a vessel resists capture, force may be used to ensure compliance.[44] Significantly, "if the ships stationed on the spot to keep up the blockade will not use their force for that purpose it is impossible for a court of justice to say that there was a blockade actually existing at the time, to bind this vessel."[45] This requirement not only authorized the use of force, but encouraged it. International law, through unsigned agreements like the London Protocol and subsequent customary law, remains somewhat unclear on the specifics of this use of force, but it appears that force, including capture or destruction, can be justified if necessary to compel a vessel to submit to search or to enforce a blockade.[46]

The use of blockade originated as a maritime analogue to the land-based siege.[47] Over time, the purpose of the blockade shifted away from a specific enemy target to general obstruction of the enemy's trade.[48] "Thus an operation in its origin purely military has developed into one which is often primarily commercial and only indirectly military in purpose."[49]

Studies: The Law of War and Neutrality at Sea 316 (1955).

44 Hall, *supra* note 39, at 203-04.

45 *Id.* at 197 (citing Juffrow Marie Schroder, 3 C.Rob. 156 (1800)).

46 *See, e.g.*, The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries 259-75 (Natalino Ronzitti, ed., 1988).

47 *See* Tucker, *supra* note 43, at 283; *see also* Hall, *supra* note 39, at 194 (discussing the historical origins of practice of blockade).

48 *See* Tucker, *supra* note 43, at 296-315 (reviewing blockade measures used during the two World Wars). The most ambitious example of a commercial blockade occurred during the American Civil War. During that conflict the United States "blockaded" the entire coast of the Confederate States of America. This three thousand mile barricade aimed at, and largely achieved, the elimination of military imports to and the export of cotton from the Southern states during the five years of the war. *See also* Carlton Savage, Policy of the United States Toward Maritime Commerce in War (1934); Frances H. Upton, The Law of Nations Affecting Commerce During War: With a Review of the Jurisdiction, Practice and Procedure of the Price Courts (1863).

49 Hall, *supra* note 39, at 195.

Commentators disagree about the validity of blockade operations given the prevailing economic aims of such actions.[50] The immediate quandary posed by blockade campaigns is whether they are still legitimate in the context of a broad economic target. Accepted notions of ***jus in bello***[51] preclude civilians as targets of any military action, but the broad economic scope of modern blockades impairs civilians as well as the military. This problem is aggravated by the incentive to enact the blockade in a highly inclusive manner that is created by the effectiveness requirement of the blockade.[52] The ultimate result of a blockade action may be civilian deprivation including food shortages and starvation.

International law strictly prohibits starvation of civilians as a "means of warfare,"[53] indicating that broad-based blockades may be *prima facie* illegal.[54] While the purpose of blockade actions is to compel the surrender of the enemy[55] rather than starvation of civilians, the distinction may be meaningless, because "[t]he purpose of all warlike acts is the surrender of the

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50 *Compare* D.P. O'Connell, The Influence of Law on Sea Power 44 (1975)(defending the practical use of blockade if standards are revised) *with* McCoubrey & White, *supra* note 36, at 305 (finding the principles of blockade ill-suited to the pragmatic exigencies of maritime warfare).

51 ***Jus in bello*** is best understood as the law in war. It dictates operational limitations on fighting the war rather than the principles that create a legitimate basis for starting a conflict or ***jus ad bellum***. *See, e.g.*, McCoubrey and White, *supra* note 36, at 189 (defining and comparing the terms). As the authors point out, there is a degree of interaction between the two concepts that legitimizes the ongoing nature of the conflict. *Id.*

52 Article 70 of Additional Protocol I excepts humanitarian aid from a blockade provided: (1) the aid is humanitarian not political, (2) the aid is impartial, (3) the aid is given in a non-discriminatory manner, (4) it is issues with the agreement of all concerned parties. Article 70, Geneva Protocol I. These terms leave broad discretion to the belligerent and are subject to a degree of manipulation. *See* G. Roberts, *The New Rules for Waging War: The case Against Ratification of Additional Protocol I*, 26 Va. J. Int'l L. 209 (1985).

53 Article 54, Geneva Protocol I (1977).

54 *See, e.g.*, L. Doswald-Beck, *The Value of the 1977 Geneva Protocols for the Protection of Civilians*, Law and Force in the New International Order 159 (Lori Damrosch & David Scheffer, eds., 1991).

55 *See* C. Mudge, *Starvation as a Means of Warfare*, 4 Int'l Law. 228 (1970).

enemy. Humanitarian law merely imposes limitations on the ***methods*** of achieving such surrender."[56]

Thus the broad application of current "blockade" actions and the limitations of the classical blockade theory make it ill-suited as a paradigm for the use of force in conjunction with economic sanctions. While the theory may be adaptable to current conditions, the use of blockade principles creates a Hobson's choice for the blockader. On the one hand, the blockader may exclude all food to ensure the blockade is effective, creating an over-inclusive exclusion that violates humanitarian norms. On the other hand, the blockader may risk failing to maintain the degree of effectiveness necessary to maintain a legally-recognized blockade under international law.[57]

2. The Law of Contraband

The second traditional law alternative, the law of contraband, developed as a principle of customary international law also, but without the strict conditions that were placed on the law of blockade. It is a more flexible doctrine that permits a nation to search and visit ships suspected of delivering war materials to its opponent.[58] Actions taken under the law of contraband are, therefore, directed at a "military" cargo destined for the opponent.[59]

The primary exigency in law of contraband cases is the categorization of any cargo as absolute contraband, conditional contraband, or free cargo, based upon the military nature and uses of the cargo.[60] Absolute contraband consists of strictly military material such as guns, conditional contraband includes goods suitable for military or civilian

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56 *Id.* at 159 (emphasis in original).

57 *See* Draper, *supra* note 38, at 20 (asserting that, "[a]t the moment it is quite possible that humanitarianism may have outstripped its practical limits").

58 *See* Hall, *supra* note 39, at 210 ("A belligerent is entitled to prevent his enemy from being supplied by sea with commodities of use in the prosecution of the war").

59 The law of continuous voyage applies to the law of contraband. *See* Tucker, *supra* note 43 (discussing the continuous voyage concept as applied to a blockade).

60 *See* McCoubrey & White, *supra* note 36, at 302.

functions, and free cargo is limited to freight appropriate only for civilian uses.[61] A belligerent may seize any cargo evaluated as serving a military objective, and therefore classified as absolute or conditional contraband.[62] The failure of any vessel to consent to a contraband search opens that vessel to use of force actions to enforce the lawful search.[63]

The central assumption of this doctrine is that the receiving belligerent can and will differentiate between civilian and military destinations for conditional contraband.[64] If a receiving belligerent fails to create some means of verifiably discriminating between destinations, the opposing belligerent may presume that all conditional contraband is destined for military use.[65] In modern conflicts, states often fail to meet that obligation of discrimination, in the same way that they fail to separate civilians from military targets.[66] As a result, the law of contraband can be uncertain in practical application.

Current rules of contraband allow the belligerent to designate the products in each category through contraband lists.[67] Under this scheme, the number and type of products subject to classification as contraband increases proportionally to the nature of the conflict and the defensive

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61 *Id.*

62 *Id.*

63 *See* Tucker, *supra* note 43, at 336 (outlining the rights and duties of each side in a contraband operation). These responsibilities arise under the corollary armed conflict doctrine of search and visit. Search and visit exists as a means to avoid conflict when a belligerent seeks to verify the contents or destination of a merchant ship as part of contraband or blockade operations. *Id.* at 336-38 (providing a general discussion of search and visit).

64 *Id.* at 267.

65 *See* Hall, *supra* note 39, at 216; *but see* W. H. Parks, *Air Law and the Law of War*, 32 A.F. L. Rev. 1, 138-39 (1990) (discussing attempt of Protocol I of 1977 to shift the presumption the other way).

66 *See, e.g.*, Schachter, *supra* note 22, at 467 (discussing these concerns against the Iraqi actions in the Persian Gulf War).

67 *See* Tucker, *supra* note 43, at 264-65 (discussing the classification of cargo as contraband).

necessity of the belligerent.[68] The law of contraband fails to provide an effective standard for limiting a belligerent's conduct against third parties, however, and subsequently provides little guidance in use of force decisions. That absence of guidance supports the view that no useful customary international law standard on contraband actually exists. "There is little or no relationship between the contraband provisions of the 1909 Declaration of London and the declarations made by the belligerent . . . the provisions of the 1909 declaration of London on the subject of contraband do not, therefore, appear to have any general State acceptance. . . ."[69] The lack of an objective standard permits the belligerent to create an over-inclusive list of contraband goods to ensure that no goods of military value reach the enemy. Alternatively, international concerns with humanitarian goals may lead to an overly narrow definition of contraband that fails to satisfy the military exigencies and that is ultimately ignored.

3. The Law of Unneutral Service

The third customary law alternative, the law of unneutral service, provides a rationale for the use of force against a neutral vessel when the neutral vessel abandons its neutrality. A vessel abandons its claim to neutrality if it participates in convoy operations, delivers "military" goods, or breaks a blockade, because the neutral then takes on the character of an enemy vessel.[70]

Under international law, however, the standard of "assuming enemy character" is an exacting one.[71] As a result, the doctrine may fail to provide a sound legal foundation for use of force decisions in response to economic sanctions because the strict requirements of "assuming enemy character" may not be satisfied solely by the disregard of economic sanctions.

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[68] *Id.* at 267, n.2 (citing the U.S. Navy's contraband instruction for WWII which included all foodstuffs and clothing); *see also* McCoubrey and White, *supra* note 36, at 304 (discussing the all embracing nature of war).

[69] Levie, *supra* note 41, at 171. The 1909 Declaration was the only attempt to articulate the categories of contraband, so there appears to be little agreement regarding the goods that are subject to categorization as contraband.

[70] *See* Frederic De Mulinen, Handbook on the Law of War for Armed Forces 109 (1987) (discussing unneutral service).

[71] *See* Tucker, *supra* note 43 at 318-21.

Additionally, unneutral service tacitly incorporates contraband and blockade concepts and, consequently, includes the limitations that arise in their application to the confrontation of vessels violating sanctions.[72] For example, the indistinct definition of "military" goods common to the law of contraband and unneutral service leaves substantial leeway to violate or arbitrarily enforce the law.

As the previous discussion indicates, traditional international law precepts have significant limitations in vindicating the use of force to enforce economic sanctions. At best, substantial modifications of the theories of blockade, contraband, and unneutral service would be necessary if they are to provide a foundation for such actions. One alternative for modifying these principles is to incorporate the evolving standards of the humanitarian laws of war to limit the existing principles. While such a change could solve the problem of over-inclusion, it would not solve the problem of under-inclusion. As a result, such modifications could not solve the problems that exist in defining acceptable uses of force in enforcement of economic sanctions through traditional concepts.[73] These problems are exacerbated by the United Nations Charter.

B. The United Nations' Charter

The United Nations' Charter modifies the traditional law of armed conflict by creating an interesting paradox in the law of neutrality that may justify forcible action against nations that violate United Nations' sanctions. By creating a scheme of global collective security, the Charter turns the traditional concepts of neutrality and unneutral service on their head.

> "Under the collective security system established by the Charter of the United Nations, Member states no longer possess, in principle, the freedom either to refrain from actively participating in a war that has taken on the character of a United Nations enforcement action, or—should they not be called upon by the Security Council

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72 *See supra* notes 50 - 69 and accompanying text.

73 *Cf.*, Dieter Fleck, Commentary in The Gulf War of 1980-1988 194 (Ige F. Dekker & Harry H.G. Post, eds., 1992).

> to take military measures—to observe the duty of impartiality as laid down by the traditional law.[74]

Article 49 of the Charter requires that each Member assist in carrying out any action approved by the Security Council.[75] This requirement creates a doctrinal dilemma between traditional laws of neutrality that require impartiality in the conflict,[76] and Charter obligations that no longer permit a Member to refrain from United Nation enforcement actions.[77]

Redefining the concept of neutrality may alleviate the tension between these irreconcilable obligations. "Qualified neutrality" may be achieved by a nation through simple non-participation in a conflict rather than through traditional impartiality.[78] Such qualified neutrality would preclude a state from undermining United Nations' actions and would fulfill, at least minimally, a Member's commitments to the United Nations.[79]

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74 Tucker, *supra* note 43 at 171.

75 Article 49 provides: "The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council." U. N. Charter art. 49.

76 *See, e.g.*, Sir Thomas Erskine Holland, Letters to the Times Upon War and Neutrality 1881-1920 129 (1921) (setting out the duties of neutrals as Abstention, Prevention and Acquiescence).

77 *See, e.g.*, J.F. Lalive, *International Organizations and Neutrality*, 24 B.Y.U. Int'l L. Rev. 80 (1947). This conclusion assumes that the Security Council decides to take action, not just recommend action. *See* U. N. Charter art. 25. If the Security Council resolution only recommends action, states may refrain from the conflict.

78 Tucker, *supra* note 43 at 174.

79 The Charter provides in relevant part:

> The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all Members of the United Nations or by some of them, as the Security Council may determine.

U.N. Charter art. 48. *But see* Tucker, *supra* note 43, at 172 (pointing out that neither Article 2 nor Article 48 require active participation by all members); U.N. Charter art. 50 (exempting states with special problems from participating in sanctions).

III. A FUNCTIONAL APPROACH TO USE OF FORCE AGAINST NEUTRALS TO ENFORCE ECONOMIC SANCTIONS

The Iran and Iraq war from 1980-1988 included numerous attacks on neutral shipping by each of the belligerents.[80] As a result of examining these attacks, Lieutenant Commander Frank V. Russo developed a functional targeting theory that sought to resolve the conflicts between the laws of armed conflict and the needs of the military.[81] Commander Russo developed the functional model as a means for determining and evaluating the legitimacy of attacks on oil tankers during the so-called "tanker war," but the principles involved are equally useful in making economic sanction related use of force decisions.

A. Functional Targeting Analysis

Commander Russo's functional standard looked beyond the doctrines of the traditional law of naval warfare to evaluate use of force decisions based on the interrelationship of four considerations that "define the outer limits within which objects of legitimate attack may generally be identified, and . . . establish the requirements which, in any given situation, further circumscribe the set of generally identified objects of legitimate attack."[82] The four considerations are: (1) a functional targeting criteria, (2) a standard of military objective, (3) a balance of neutral and belligerent rights, and (4) principles of the law of armed conflict.[83]

1. Functional Targeting Criteria

The first step in the functional analysis is a functional targeting criteria that defines the outer limits of valid military objectives.[84] This consideration looks to the merchant vessel's function as the primary indicator of its military value and thus determines the initial legitimacy of an

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80 Judith Miller, *Kuwait Starting to Feel Impact of Shipping War,* N.Y. Times, Mar. 29, 1984 at A8.

81 Russo, *supra* note 28, at 153.

82 *Id.*

83 *Id.* at 164-176.

84 *Id.* at 164.

attack on the vessel.[85] Specifically, the lawfulness of an attack is based upon the degree to which the vessel is integrated into the enemy war effort or contributes to the enemy's military capabilities.[86] As a result, the question of whether a particular vessel is susceptible to armed attack turns on the mission of the vessel rather than the flag of the vessel.[87] While this is a significant digression from traditional concepts of war at sea, Commander Russo poses the rhetorical question, "[i]s there a valid legal reason why neutral merchant ships should be immune from attack when they are employed on tasks functionally indistinguishable from those where enemy merchant vessels are subject to attack."[88]

2. Standard of Military Objective

The second factor of the functional approach to use of force decisions is whether an attack would meet a standard of military objective.[89] The military objective standard involves two distinct, but interrelated aspects.[90] The first is a flexible prong that requires the contribution of the target to the enemy's capability be substantial.[91] A finding that the target satisfies the first prong is limited by the second prong

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85 *Id.* The mission of the merchant vessel rather than its destination or cargo provides the determining factor.

86 *Id.* at 179-195 (evaluating various possible functional targeting criteria).

87 *Id.* at 164.

88 *Id.* at 166 (citing W.J. Fenwick, Military Objectives in the Law of Naval Warfare (1989). This paper served as the introductory report for a meeting of the Round Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea held in Bochum, FRG, Nov. 1989.

89 Russo, *supra* note 28 at 168.

90 The two prongs of the functional standard for military objective are similar to the definition of military objective in Article 52(2) of Additional Protocol I. *Id.* at 168.

91 *Id.* at 168. Note that this prong is virtually identical to the functional criteria, but as Commander Russo points out this is appropriate since the principle test, ". . . determine whether or not a merchant ship is a legitimate military objective should be a functional test: What is it doing and to what extent is it either directly participating in hostilities or contributing to the enemy war effort." *Id.* (citing W.J. Fenwick, *supra* note 88, at 72).

which dictates that attacking the target provide a definite military advantage to the attacker.[92] A target that fails to meet both prongs of the military objective standard falls outside the sphere of targets of legitimate attack. This standard is, therefore, the first step in a series of reductions in the size of the set of legitimate targets of attack.[93]

3. Balance of Neutral and Belligerent Rights

To achieve widespread acceptance, any rule of targeting must strike an appropriate balance in the inherent tension between belligerent concerns and neutral rights.[94] A bright-line rule that creates an unlimited right of attack on merchants will not be accepted by third-party countries interested in maintaining their trade with a belligerent. Conversely, few belligerents would accept a categorical doctrine that precludes attacking a third party merchant engaged in overt military aid with the enemy.

The balance of interests between belligerents and neutrals creates a continuum of legitimate attack. At one end of the spectrum, inter-neutral maritime commerce is always protected from attack.[95] At the other end of the continuum, a neutral party delivering military equipment to a belligerent would always be considered to be a lawful target.[96] In the first instance, the belligerent's interest is minimal and the non-belligerent's interest in free trade is at its maximum. In the second, while the non-belligerent's interest in free trade remains undiluted, the interest of the belligerent in keeping military supplies from its enemy outweighs the non-belligerent commercial interest.

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92 Russo, *supra* note 28, at 168.

93 Each of the considerations that follow the initial definition of the set of legitimate targets of military attack under the functional criterion "represents a fully inclusive subset of the set of generally defined objects of legitimate attack." *Id.* at 164. This relationship can best be visualized as a series of circles with the area of each succeeding circle (the four considerations of the approach) smaller and completely included within the preceding circle. *Id.* at Figure 2.

94 *Id.* at 171-72.

95 *Id.* at 172.

96 *Id.*

4. Principles of the Law of Armed Conflict

The laws of armed conflict originated to impose some limitations on war based on accepted moral and pragmatic principles. The modern law of armed conflict embraces five general principles that collectively comprise minimum restrictions on armed attack to promote humanitarian goals: distinction and discrimination, necessity, proportionality, humanity, and honorable conduct.[97] Unlike the traditional doctrines of blockade, contraband, and unneutral service, the functional approach openly incorporates those principles and the underlying humanitarian goals. The functional approach utilizes the traditional law to define the norms rather than as an attempt to create a generic list of exceptions to a bright-line rule.

The principle of distinction and discrimination requires the attacker to distinguish between combatants or other military objects and civilian or protected objects.[98] This criteria can only be satisfied by sound procedures of target verification and evaluation.[99]

The principle of necessity limits the application of force to circumstances where it is indispensable to achieve legitimate military objectives.[100] The principle of proportionality requires a belligerent to balance the amount of destruction and death resulting from the use of force with the value of the military objective that the force is intended to achieve.[101] Where the military advantage of an attack is outweighed by

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97 *Id.* at 176.

98 Id. For example, hospital ships and coastal fishing vessels are protected objects under the discrimination principle. See De Mulinen, *supra* note 70, at 48-49.

99 Russo, *supra* note 28, at 176; see *also* The Military Objective and the Principle of Distinction in the Law of Naval Warfare: Report, Commentaries and Proceedings of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflict at Sea (Wolf Hentschell von Heinegg, ed., 1989).

100 Russo, *supra* note 28, at 176.

101 *Id.* at 177.

the destruction and death that the attack would cause, the use of force would not satisfy either principle.[102]

The final two principles, humanity and honorable conduct, seek to curtail the extent of collateral damage that is acceptable under the proportionality principle. The principle of humanity requires the attacker to make every effort to minimize the collateral damage inflicted on civilians as the result of an armed attack.[103] The principle of honorable conduct forbids the belligerent from misusing the humanitarian protections afforded under the law of armed conflict to shield legitimate military objectives from the enemy.[104] Inappropriately shielded military objectives remain legitimate and are subject to attack.[105]

5. The Integration of Functional Targeting Criteria

The interrelationship of the four considerations of the functional approach determines the ultimate acceptability of the use of force in a particular situation. The functional targeting criterion defines the full set of possible targets while the three remaining considerations serve to limit this broadly defined set.[106] The intersection of the four considerations provides a narrowly defined, fully-inclusive, subset of objects of that may be legitimately and rationally subjected to attack.[107]

One area of concern remains, however. The flexibility that is the ultimate value of the functional approach also creates the risk of a

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102 "Implicit in this principle is the recognition that, in the course of a legitimate use of force, noncombatants and civilian objects will suffer injury, death and destruction." *Id.*

103 *Id.*

104 *Id.* This principle is often violated during conflicts. During the Persian Gulf Conflict, Iraq frequently intermingled protected and military objects to attempt to thwart air attacks. *See, e.g.*, Marlin Fitzwater and Margaret Tutwiller, *Fact Sheet: Civilian Casualties at Iraqi Military Sites*, U.S. Department of State Dispatch, Feb. 18, 1991 at 114.

105 Russo, *supra* note 28, at 178.

106 *Id.*

107 *Id.*

corresponding lack of predictability.[108] As an analysis based upon the totality of circumstances in factually unique situations, the functional analysis is may appear less predictable than a set of bright-line rules.

In practice, however, the potential predictability problem is offset, because the functional approach minimizes the disparities between the laws of war and the practice of war. The reduction of those dissimilarities makes the actions of belligerents actually more predictable because they will comply more consistently with the universal precepts regulating military behavior.[109]

B. The Functional Approach to Economic Sanctions and Use of Force against Neutrals

To date, the traditional protection afforded neutral shipping, with specific exceptions, has failed to synthesize emerging humanitarian goals[110] with modern military needs and capabilities in the development of force decisions during economic sanctions. A functional approach towards enforcement avoids this problem and effectively fuses the conflicting goals of humanitarian concerns with military needs and capabilities. The actual factors of the functional approach are fundamentally units of military necessity and humanitarian concern. The interaction of the various factors result in the creation of a broad category of legitimate military targets limited by the principled application of humanitarian goals.

A functional approach to the use of force in enforcing sanctions resolves the problem of under-inclusion present in the doctrine of unneutral service. Under that traditional doctrine, force would not be lawful to stop a neutral power that is violating sanctions without falling under the control of the enemy.[111] Since "[t]here is no reason in experience or logic why the Protocol should be interpreted as protecting neutral merchant ships which are engaged in the same functional activities that result in a lack of

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108 *Id.*

109 *Id.* (claiming one goal of the functional approach is diminishing the distinction between policy and practice).

110 *See generally* Geza Herczegh, Development of International Humanitarian Law (1984); Geoffrey Best, Humanity in Warfare (1980).

111 *See* Russo, *supra* note 28, at 171.

protection for an enemy merchant ship,"[112] a functional approach would permit the use of force against such vessels.

The functional approach also resolves the problems of over-inclusion presented by the traditional doctrines of blockade and contraband. While those doctrines may permit or even encourage the interception of goods without regard to humanitarian concerns, a functional analysis implicitly integrates those concerns through the direct application of the humanitarian law of war.[113]

As an example, suppose that during a winter conflict that includes economic sanctions, a neutral merchant attempts to deliver bulk clothing to a belligerent for the use of civilians in the country. Under application of blockade or contraband principles, force could be used to exclude the material because of its destination or because of its suitability for military purpose. The functional approach would yield a different, more pragmatic and humanitarian answer however. Even though the situation may justify the use of force under the initial functional criterion, the principle of limitation would remove the action from the sphere of acceptable uses of force. Assuming that no hidden military advantage existed, the use of force against the neutral vessel would be precluded because the material is distinctly civilian, the use of force would not achieve a legitimate military end, and the danger to the civilian population is out of proportion to the potential military gain.[114]

In addition, the functional approach more effectively balances the rights of third-parties against the rights of the belligerents than traditional doctrines. The functional approach is thus far better suited for pragmatic use-of-force decisions in the complex diplomatic situations that characterize the global tensions of today.[115] The use of flexible criteria that equitably

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[112] W. T. Malison, Studies in the Law of Naval Warfare: Submarines in General and Limited Wars 129-30 (1968).

[113] See *supra* notes 97-105 and accompanying text; see *also* Edward K. Kwakwa, The International Law of Armed Conflict: Personal and Material Fields of Application 34-39 (1992) (defining the principles of armed conflict as military necessity, humanity, proportionality, and distinction).

[114] See *supra* notes 99-102 and accompanying text.

[115] See McCoubrey and White, *supra* note 36, at 342.

balances competing interests supports the decisional approach as a legitimate rule of law.[116]

Two examples demonstrate the superiority of the functional approach in using force to compel compliance with economic sanctions even in the difficult case of humanitarian aid.

In the first example, assume that the Security Council has authorized sanctions against Iraq and the use of force to enforce those sanctions, but did not exclude humanitarian aid from the sanctions.[117] The United Nations forces that are enforcing the sanctions encounter a neutral vessel attempting to deliver food, clothing, building and medical supplies to Iraq. The cargo will be delivered to Baghdad, but its ultimate destination is the Kurdish population in northern Iraq. The on-scene naval commander is able to confirm the cargo and destination of the neutral vessel and also confirms that the vessel is under the control of an Iraqi leader in the Kurdish north.

The first issue in a functional analysis is to define the outside parameters of legitimate targets through the functional criteria of whether the vessel substantially contributes to the enemy's military effort. Given the political discontent that exists between the Kurds and the ruling regime in Iraq, establishing a contribution to the war effort from such a delivery is unlikely. If anything, the delivery to the Kurds will probably strengthen their resolve to confront the current regime. Even assuming such a connection can be made, the shipment is probably safe from legitimate attack because of the considerations discussed below.

While the first prong of the military objective standard is identical to the functional targeting criteria and is similarly satisfied, the limiting prong, definite military advantage, is not satisfied if force is used to prevent the delivery of the goods to the Kurds. While reducing the Iraqi work force would undermine the war effort, preventing the Kurds from performing forced labor would have an indirect and insubstantial effect on Iraqi

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[116] *See* Thomas Franck, The Power of Legitimacy Among Nations 38 (1990) (A ***second*** dynamic pulling toward voluntary rule compliance is the belief that a rule is ***just***, because it incorporates principles of ***fairness*** . . .") (emphasis in original).

[117] This removes these tangential issues from this evaluation of the functional analysis and applies an international use of force which would be acceptable to the broadest range of scholars.

capabilities. At best, the military advantage gained would be hypothetical and minor.

Finally, the remaining considerations of the functional approach, balance of interests and the principle of limitation, would also preclude attacking the vessel to prevent the delivery. Given the minimal nature of the military gain and the strong humanitarian concerns involved, preventing the delivery of the goods to the Kurds would violate international norms.[118]

A concise application of traditional doctrines to this same scenario demonstrates how poorly these doctrines resolve the problems presented by this example. Under the doctrine of blockade the ship would be excluded automatically because its destination is the target of the blockade. Similarly, the involvement of the Iraqi leader, despite the leader's benevolence, would place the neutral within the doctrine of unneutral service and make it a legitimate target of attack. Finally, the law of contraband, if imposed as it was during previous wars, would likely include most of the items carried by the merchant as conditional contraband. Therefore, under each of the traditional exceptions the neutral would be categorically subject to force if the vessel refused to comply with orders to divert from its intended route.

For the second example, assume that a neutral merchant vessel controlled by a wealthy Turkish national with no connections to Serbia and not sanctioned by Turkey is attempting to deliver similar goods to Par, Serbia. The captain of the merchant claims the goods are for the civilian population in Par but the naval commander cannot confirm their ultimate destination.

The first three considerations under the functional analysis, functional criterion, military objective standard, and the balance of neutral and belligerent rights, would render the merchant vessel as a legitimate target of force. Most of the goods aboard the merchant are capable of military use and are destined for the capitol and command center of the enemy. They make a significant contribution to the military efforts of Serbia. Similarly, depriving the enemy of such goods in an area of significant military activity and civilian support would directly hinder its war effort and provide a definite military advantage. A strong belligerent interest in crippling the enemy offsets the self-interest of the third party, ultimately

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[118] The United Nations led by the United States and its allies reached a similar conclusion regarding international interest in protecting the Kurds after the war when they supplied the Kurds and created the "no fly zones" in the north.

justifying the use of force. The neutral falls within the sphere of acceptable targets at this stage of the functional method.

The final step of the functional process is to apply the limiting principles of the law of armed conflict.[119] The distinction principle, which requires the belligerent to differentiate between civilian and military objects, would not affect the targeting analysis. The inability of the United Nations forces to confirm the ultimate destination of the cargo prevents a clear distinction between the civilian and military and fails to remove the merchant from the sphere of legitimate targets.

The application of the necessity and proportionality principles also depends on the specific circumstances. Given Par's role as command center and capitol and the support of the population for the ruling regime, preventing the delivery of the goods on board the merchant vessel appears to be both necessary to deny Serbia the use of the materials in support of their hostilities and proportional to the impact of the use of force involved.

In this case, the functional approach validates the naval commander's use of force to prevent the delivery of goods by the neutral merchant vessel. Finally, when the decisions of the on-scene commanders are based on strict Rules of engagement designed by higher national or international authorities through a functional approach, the actions are sufficiently deliberate and controlled to ensure international legitimacy.

III. CONCLUSION

Economic sanctions are an accepted and frequently used tool for confronting violations of international standards and the use of force, actual or threatened, creates the most important incentive for third parties to honor these sanctions. Yet existing customary law principles of blockade, contraband and unneutral service inadequately regulate these important use of force decisions. The absence of a workable standard prevents a belligerent from making an antecedent use of force decision in these circumstances and fails to provide the international community a touchstone for gauging the validity of the actions after they occur.

Any legitimate rule of law must furnish a normative and retributive yardstick for determining the lawfulness of an action;

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[119] *See supra* notes 97-105 and accompanying text.

> Law is not the antithesis of force. Legal systems and the political systems of which they are a part and which they seek to regulate are based upon the authoritative use of force. The question for jurists, then, is not "the non-use of force," but the assignment of the competence to use force . . . and the determination of the contingencies, purposes, and procedures for the use of authoritative force.[120]

The functional approach satisfies this important function by establishing a practical model for making use of force decisions. At the very least, the functional approach articulates a practical standard that reflects the realities of contemporary conflicts and provides a framework for balancing the often contradictory goals of modern military authority and the humanitarian laws of war.

Todd Wynkoop[121]

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120 W. Michael Reisman, Allocating Competencies to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects in International Law and the New World Order 26 (Lori Fischer Damrosch & David J. Scheffer, eds., 1991).

121 The author wishes to thank Professor Jane Stromseth of Georgetown University for forcing the issues into focus and for the many suggestions she provided that were incorporated into this article. The opinions expressed in this article are solely those of the author and do not represent the opinions of the Department of Defense, the Department of the Navy, or the Judge Advocate General's Corps.

THE GULF OF AQABA AND THE STRAIT OF TIRAN: THE PRACTICE OF "FREEDOM OF NAVIGATION" AFTER THE EGYPTIAN-ISRAELI PEACE TREATY

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I. INTRODUCTION

Over the past forty-five years, blockades of the Strait of Tiran leading to the Gulf of Aqaba have been the leading cause of two major wars in the Middle East. A Peace Treaty between Israel and Egypt went into effect in 1979. This was the first time that both parties recognized "freedom of navigation" in the Strait of Tiran and the Gulf of Aqaba. The purpose of this paper is to analyze the present status of "freedom of navigation" in the Strait and Gulf in the light of past historical claims, evolving legal regimes and recent events in those waterways.

II. BACKGROUND AND HISTORY

The Gulf of Aqaba is nearly 100 miles long and varies in width from approximately 3 miles at its narrowest to over 16 miles at its widest.[1] The Gulf is bordered by the states of Egypt, Israel, Jordan and Saudi Arabia. The only entrance to the Gulf of Aqaba is through the Strait of Tiran, which is approximately 3 miles wide. Two islands, Tiran and Sanafir, are inside the Strait. Although Saudi Arabia has claimed the islands in the past, the islands are now considered Egyptian territory. The Strait's primary channel, the Enterprise Passage, is

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1 Ann Ellen Danseyar, Note, *Legal Status of the Gulf of Aqaba and the Strait of Tiran: From Customary International Law to the 1979 Egyptian-Israeli Peace Treaty*, 5 B. C. INT'L & COMP. L. REV. 127, 131 (1982); Mohamed ElBaradei, *The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime*, 76 AMER. J. INT'L L. 532 (1982).

situated between Tiran Island and the Egyptian Sinai Peninsula coast.[2] Egypt, Israel, and Saudi Arabia have claimed territorial seas of twelve miles in the Gulf of Aqaba, while Jordan has claimed three miles.[3] The Strait of Tiran and the Gulf of Aqaba are the only navigable waters leading to the Israeli port of Eilat and the Jordanian port of Aqaba.

Disputes between Israel and her neighboring Arab states regarding navigation through the Strait of Tiran and the Gulf of Aqaba have endured since the establishment of the State of Israel in 1948. Israel's sovereignty over Eilat, on Israel's littoral strip on the Gulf of Aqaba, which is approximately six miles wide, was established in 1949 after the signing of the Israeli-Egyptian General Armistice Agreement.[4] Israel signed Armistice agreements with Jordan, Lebanon and Syria in that same year. The United Nations Truce Supervision Organization (UNTSO) was empowered to support the four separate Mixed Armistice Commissions (MACs) which were responsible for investigating grievances by the parties relating to the Armistice Agreements.[5] Despite a U.N. Security Council resolution in 1951 calling on Egypt to refrain from interfering with international commercial shipping through the Suez Canal, Egypt began to regulate vessels transiting the Strait of Tiran. Egypt first began regulating by requiring prior notification and inspections, and then by only allowing transit to "friendly" vessels. Egypt forbade "enemy" warships to transit the Strait and cautioned that "enemy" commercial vessels were subject to seizure.[6] Egypt's announced restrictions of passage through the Strait, which

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2 ElBaradei, *supra* note 1, at 532.

3 *Id. See also* Ali A. El-Hakim, *The Middle Eastern States and the Law of the Sea* 135 (Syracuse University Press 1979).

4 Ruth Lapidoth, *The Strait of Tiran, The Gulf of Aqaba, and the 1979 Treaty of Peace Between Egypt and Israel*, 77 AM. J. INT'L L. 84, 90 (1983). *See also* El-Hakim, *supra* note 3, at 135-36.

5 UNITED NATIONS, *THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING* 20-25 (1990).

6 El-Hakim, *supra* note 3, at 137. *See also* L. BLOOMFIELD, *EGYPT, ISRAEL AND THE GULF OF AQABA IN INTERNATIONAL LAW*, 7-8 (1957).

led to incidents of firing upon American, British and Italian commercial vessels, coincided with increasing economic and maritime activity at the Port of Eilat.[7]

Increasing hostilities between Egypt and Israel in 1956 led to Israel's preemptive invasion and eventual occupation of the Sinai Peninsula and the islands of Tiran and Sanafir in the Strait of Tiran. Israel quickly announced that the Strait of Tiran and the Gulf of Aqaba were international waterways and guaranteed free navigation to ships of all countries.[8] By February of 1957, Israel had withdrawn completely from the Sinai Peninsula with the exception of Sharm el-Sheikh. Israel emphasized that an Israeli presence there was essential to maintain freedom of navigation through the Strait of Tiran and in the Gulf of Aqaba.[9] Israeli troops were eventually withdrawn from Sharm el-Sheikh in accordance with U.N. General Assembly Resolution 1124, due in part to American pressure as well as American assurances that it would "use all of its influences" to support an innocent passage regime in the Strait and the Gulf.[10] A United Nation's Emergency Force (UNEF) was deployed to supervise the cease-fire and to secure the provisions of the Israeli-Egypt General Armistice Agreement of 1949.[11]

UNEF troops were deployed in the Sinai Peninsula. A detachment was posted at Sharm el-Sheikh in order to maintain constant observation over the Strait of Tiran.[12] Although tensions increased in other areas included in the Arab-Israeli conflict, the Egyptian-

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7 Bloomfield, *supra* note 6, at 11-12. In the case of an American vessel, SS ALBION, the ship was actually bound for Aqaba with a gift of wheat when she was fired upon by the Egyptians. The Egyptians apologized claiming they mistakenly thought the ship was bound for Eilat. *Id.* at 11. *See also* El-Hakim, *supra* note 3, at 138.

8 El-Hakim, *supra* note 3, at 138.

9 UNITED NATIONS, *supra* note 5, at 63; *see also* Bloomfield, *supra* note 6, at 151.

10 Bloomfield, *supra* note 6, at 152.

11 UNITED NATIONS, *supra* note 5, at 69; *see also* Mona Ghali, *United Nations Emergency Force I, in The Evolution of UN Peacekeeping* 112-13 (St. Martin's Press 1993).

12 UNITED NATIONS, *supra* note 5, at 72-73. *See also* El Baradei, *supra* note 1, at 533.

Israeli border, and particularly shipping in the Strait and the Gulf, were generally peaceful until 1967. In May of 1967, the Egyptian government requested the withdrawal of UNEF troops from the Sinai Peninsula.[13] Shortly afterwards, Egypt announced that Israeli ships and "strategic cargo" bound for Israel would be precluded from transiting the Strait of Tiran. The ensuing Six Day War once again resulted in Israel's occupation of the Sinai Peninsula, including Sharm el-Sheikh and the islands of Tiran and Sanafir.[14]

Israel maintained control over navigation through the Strait of Tiran and Egypt's territorial sea in the Gulf of Aqaba until 1982, when Israel completed the withdrawal of her troops pursuant to the 1979 Peace Treaty between Egypt and Israel.[15] In the aftermath of the October 1973 war, a second U.N. Emergency Force (UNEF II) was established to implement a cease-fire, which returned the parties to the positions that they had occupied prior to the 1973 conflict.[16] In 1979, Egypt and Israel signed the above-mentioned Peace Treaty which, among other things, provided for Israel's withdrawal from the Sinai Peninsula. The Peace Treaty divided the peninsula into three zones, with different limitations of military forces in each zone. Egypt's gulf coastline and the islands of Tiran and Sanafir are in Zone "C", where only civilian police with limited weapons are allowed.[17] Significantly, the Peace Treaty recognizes "the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight."[18] The mandate of UNEF II lapsed in July 1979 and the force was withdrawn. Freedom of navigation through the Strait of Tiran is now monitored by a non-U.N. entity, the

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13 UNITED NATIONS, *supra* note 5, at 76.

14 El-Hakim, *supra* note 3, at 139.

15 ElBaradei, *supra* note 1, at 533.

16 UNITED NATIONS, *supra* note 5, at 88.

17 *Treaty of Peace Between the Arab Republic of Egypt and the State of Israel*, March 26, 1979 at 18 I.L.M. 362 [hereinafter Treaty of Peace]. *See* Lapidoth, *supra* note 4, at 97-98.

18 *Treaty of Peace*, *supra* note 17, Article V(2).

Multinational Force and Observers (MFO), established by Egypt and Israel in 1981, with the support of the United States.[19]

II. LEGAL REGIMES GOVERNING NAVIGATION IN THE GULF AND STRAIT

Conflicting opinions of Arabs and Israelis as to legal regimes regarding navigation through the Strait of Tiran and in the Gulf of Aqaba have historically been the norm. Israel traditionally maintained that the Gulf of Aqaba and the Strait of Tiran were international waters which should be subject to innocent passage.[20] Although there is no exact legal definition for "international waterways," it has been asserted that the term implies "sea spaces . . . open to international navigation."[21] Israel's position apparently was supported with regard to the Strait of Tiran by the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (hereinafter cited as the 1958 Convention). Article 16(4) of the 1958 Convention reads: "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state." Whether one considered the Gulf of Aqaba wholly as the territorial seas of Egypt, Israel, Jordan and Saudi Arabia or partly as high seas, this regime did apply to the Strait of Tiran because (1) it is a strait between one part of the high seas and the territorial sea of a foreign state (or another part of the high seas) and (2) the strait is used for international navigation.[22] As to the Gulf of Aqaba, those areas which were high seas were subject to freedom of navigation, and, the

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19 Lapidoth, *supra* note 4, at 98-99.

20 ElBaradei, *supra* note 1, at 533. *See* Paul A. Porter, *The Gulf of Aqaba: An International Waterway* 5 (Public Affairs Press, Washington, D.C. 1957). Israel, through Mrs. Golda Meir, declared it's belief that "the Gulf of Aqaba comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto." Numerous leading maritime nations, including the United States, proclaimed their belief at the UN that the waterways were indeed international. *Id.* at 6-15.

21 Lapidoth, *supra* note 4, at 91.

22 Lapidoth, *supra* note 4, at 94. *See* Porter, *supra* note 20, at 6-15.

1958 Convention would have obliged the Arab coastal states to permit innocent passage of "ships of all states" through the territorial waters of the Gulf of Aqaba.[23]

Egypt and other Arab states refuted Israel's claim to innocent passage in the Gulf of Aqaba on several grounds. The Arab states first claimed that the Gulf was ***mare clausum*** or internal Arab waters.[24] Customary international law recognizes that a single nation may claim sovereignty over internal waters which are wholly contained within its borders.[25] Although the three Arab coastal states which border the Gulf of Aqaba have argued that they should be considered a single Arab nation, this claim has been rejected by the international community because they are all separate legal entities and because Israel is a coastal state of the Gulf.[26]

Second, the Arabs claimed that the Gulf was a historic bay and hence the Arab nations have the same sovereignty over the Gulf as if it were internal waters.[27] This assertion however has been rejected because the Arab states have not exercised continuously effective control over the Gulf, and because other affected nations have not recognized the claim.[28] In addition, the claim of individual Arab states to territorial waters in the Gulf of Aqaba contradicted their declarations that the Gulf was a historic bay.[29]

Third, the Arabs asserted that Israel did not have a legitimate claim to the littoral strip in the Eilat area because Israel occupied the area subsequent to the 1949 Egyptian-Israeli

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23 Danseyar, *supra* note 1, at 154; *Convention on Territorial Sea and the Contiguous Zone*, Article 14(1), April 29, 1958, 15 U.S.T 1606, T.I.A.S. No. 5639.

24 El Baradei, *supra* note 1, at 533.

25 Danseyar, *supra* note 1, at 132-33.

26 Lapidoth, *supra* note 4, at 90; *see* Danseyar at 133-34. *See also* Porter, *supra* note 20, at 16-17.

27 Danseyar, *supra* note 1, at 134. *See also* Lapidoth, *supra* note 4, at 90.

28 Lapidoth, *supra* note 4, at 90.

29 Danseyar, *supra* note 1, at 138.

Armistice Agreement.[30] This claim is refuted by the fact that Israel's control of Eilat was recognized by the later Israeli-Jordan Armistice Agreement. By virtue of the 1979 Peace Treaty, Egypt now recognizes Israel's sovereignty over Eilat.[31]

A fourth claim by the Arab states was that the coastal states were authorized to restrict the navigation of Israeli shipping through the Strait of Tiran and in the Gulf of Aqaba since a state of war existed between the parties. Egypt claimed that the Armistice Agreement with Israel had not legally ended their war.[32] Customary international law would allow a littoral state to protect itself by restricting passage of ships of the adversary.[33] By 1957, the contention that a state of war still existed between Egypt and Israel was generally repudiated by the international community. In addition, authors have pointed out that once hostilities have ceased, it is inconsistent with the U.N. Charter for member state parties to claim that an ongoing state of war still exists.[34]

Finally, it has been contended that Egypt, as a non-party to the 1958 Convention, was not bound by the Article 16(4) regime of non-suspendable innocent passage in relevant straits.[35] The Convention however, in this instance, was codifying customary international law. The Article 16(4) regime would thus apply as well to non-party states.[36]

Before Israel occupied the Sinai Peninsula and the islands of Tiran and Sanifir in the wake of the 1967 war, it would appear that the international community considered that navigation of the Strait of Tiran was controlled by the non-suspendable innocent passage

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30 Lapidoth, *supra* note 4, at 90. *See also* El-Hakim, *supra* note 3, at 140.

31 Lapidoth, *supra* note 4, at 90.

32 Danseyar, *supra* note 1, at 138; *see also* Lapidoth, *supra* note 4, at 95.

33 Danseyar, *supra* note 1, at 138.

34 Lapidoth, *supra* note 4, at 95:

35 El-Hakim, *supra* note 3, at 140.

36 Lapidoth, *supra* note 4, at 94; *see also* Danseyar, *supra* note 1, at 151.

regime of the 1958 Convention as mentioned above. Since 1957, the United States as well as most other prominent maritime nations had declared the Gulf of Aqaba to be "international waters."[37] Additionally, innocent passage through the territorial waters of the Gulf of Aqaba was dictated by the 1958 Convention. As noted above, navigation through the Strait was generally peaceful from 1957 until the withdrawal of UNEF in 1967. In November of 1967, the United Nations Security Council, in an effort to establish " a just and lasting peace in the Middle East" adopted Resolution 242. The Resolution, ***inter alia***, proclaimed "the necessity . . . for guaranteeing freedom of navigation through international waterways in the area."[38] As will be shown below, the language recognizing the right of freedom of navigation in the Gulf of Aqaba and the Strait of Tiran would be used in later documents aimed at securing and maintaining peace in the region.[39]

After the October War of 1973, the U.N. Security Council reaffirmed the principles laid out in Resolution 242 in their entirety by calling upon the embattled parties to immediately implement the Resolution and to start negotiations aimed at establishing peace.[40]

While Israel continued to occupy the Sinai Peninsula and the islands in the Strait of Tiran, two events began in the 1970s which would more directly define the regime of navigation in both the Strait and the Gulf of Aqaba. In 1973, the Third United Nations Conference on the Law of the Sea, which drafted the 1982 United Nations Convention on the Law of the Sea (hereinafter cited as the 1982 Convention) convened.[41] The 1982 Convention includes Part III, entitled "Straits Used for International Navigation," which sets

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37 *See* BLOOMFIELD, *supra* note 6, at 152.

38 22 U.N. SCOR (1379th plen. mtg.) at 2, U.N. Doc. S/8247 (1967), *reprinted in* 17 I.L.M. at 1469; *see also* El Baradei, *supra* note 1, at 545.

39 *See* Lapidoth, *supra* note 4, at 102.

40 U.N. SCOR, 10, U.N. Doc. S/INF/129 (1973), *reprinted in* 17 I.L.M. at 1470.

41 Danseyar, *supra* note 1, at 158. At the time of this writing, the 1982 Convention is not yet in force. The provisions of Part III relating to "Straits used for International Navigation", however are widely considered to be customary international law. *See* Lapidoth, *supra* note 4, at 92.

out to distinguish between various classes of straits.[42] The 1982 Convention adopted a regime of unimpeded transit passage for straits used for international navigation which link high seas or exclusive economic zones (EEZ) with each other.[43] Transit passage as envisaged by the 1982 Convention includes the right of continuous and expeditious transit and overflight, passage of submerged submarines and a duty on coastal states to refrain from hampering transit passage.[44]

Another regime applicable to certain straits under the 1982 Convention is nonsuspendable innocent passage. This more limited passage regime would apply ***inter alia*** to vessels navigating through straits used for international navigation in situations where the strait links high seas or an EEZ with the territorial sea of a foreign state.[45] Coastal states generally have authority to regulate the safety of navigation, environmental protection and customs as well as other matters under the regime of nonsuspendable innocent passage. Innocent passage, however, must not be prejudicial to the peace, good order or security of the coastal state.[46]

The regime applicable in the Strait of Tiran under the 1982 Convention depends on the characterization of the Gulf of Aqaba. The 1982 Convention recognized that all states may establish territorial seas not exceeding twelve nautical miles from the state's baseline or low water line.[47] The 1982 Convention would thus recognize the twelve mile territorial sea claims in the Gulf of Aqaba by Egypt, Israel and Saudi Arabia. Therefore, if the Gulf of Aqaba is characterized as being entirely territorial seas by the 1982 Convention, the nonsuspendable

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42 Danseyar, *supra* note 1, at 165; *see also* Lapidoth, *supra* note 4, at 95.

43 Danseyar, *supra* note 1, at 165.

44 Articles 37-44 of the *1982 Convention on the Law of the Sea*; see Lapidoth, *supra* note 4, at 95-96.

45 Article 45 of the *1982 Convention on the Law of the Sea; see also* Lapidoth, *supra* note 4, at 95.

46 Article 19 of the *1982 Convention on the Law of the Sea.*

47 Article 3 of the *1982 Convention on the Law of the Sea.*

innocent passage regime of Article 45 would apply to the Strait of Tiran.[48] Professor John Norton Moore has suggested that Article 45(1)(b) was specifically designed with the Strait of Tiran in mind.[49]

The Gulf of Aqaba, on the other hand, is considered a territorial sea under the 1982 Convention. All ships navigating the Gulf would thus be subject to the more restrictive regime of innocent passage under Section 3 of Part II of the 1982 Convention.[50]

Under the 1978 Camp David Framework, Egypt and Israel agreed to negotiate a Peace Treaty, which was the first time that an Arab state and Israel had specifically agreed that "the Strait of Tiran and the Gulf of Aqaba are international waterways to be open to all nations for unimpeded and nonsuspendable freedom of navigation and overflight."[51] That language, espousing the principles contained in U.N. Security Council Resolution 242, was later incorporated into the 1979 Egyptian-Israeli Peace Treaty. The Treaty added a sentence in Article V(2) which covered each parties right to navigate (and overfly) the Gulf and Strait for access to their country. In addition, the parties in Annex I of the Treaty requested the U.N. to provide forces and observers to secure, among other things, "the freedom of navigation through the Strait of Tiran."[52] To avert any possible misconceptions about Article

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48 Danseyar, *supra* note 1, at 167; *see also* ElBaradei, *supra* note 1, at 550.

49 Professor John Norton Moore, Lecture at Georgetown University Law Centre (Oct. 15, 1993) (notes maintained by author).

50 Danseyar, *supra* note 1, at 160. *But see* Article 122 of the *1982 Convention on the Law of the Sea* which would characterize the Gulf of Aqaba as an "enclosed or semi-enclosed sea." Article 123, however only encourages States bordering an enclosed or semi-enclosed sea to cooperate with each other and to coordinate matters relating to living resources, marine pollution and scientific research. These articles do not discuss any navigation regimes.

51 U.N. SCOR, 10, U.N. Doc. S/INF/129 (1973), *reprinted in* 17 I.L.M. at 1470.

52 *Treaty of Peace*, *supra* note 17.

V of the Peace Treaty, Egypt and Israel signed "Agreed Minutes," which were intended ***inter alia*** to clarify the liberal regime of freedom of navigation guaranteed by the Treaty.[53]

In addition, the United States in a separate Memorandum of Agreement with Israel promised to "provide support it deems appropriate for proper actions taken by Israel . . ." in response to any violation of the Peace Treaty. This vague promise of support listed "a blockade of Israel's use of international waterways" as an example of such a violation. The United States was more clear in its support of the parties' rights of navigation and overflight for access as detailed in the second sentence of Article V(2) of the Peace Treaty.[54] It has been pointed out that the United States did not specifically define what it meant by "support."[55]

Subsequent statements by the governments of the parties to the Treaty appear to reinforce the liberal regime of freedom of navigation envisioned by Article V(2). Ambassador Rosenne, speaking for the Israeli delegation at the 1982 Conference in December 1982, implied how "regressive elements" in Part III of the 1982 Convention were overridden by a "different regime . . . prescribed by treaty." He then went on to discuss the support of the United States delegation for the freedom of navigation and overflight in the Gulf of Aqaba and the Strait of Tiran encompassed in the Peace Treaty.[56] Egypt, upon ratification of the 1982 Convention in August 1983, made a declaration reaffirming the establishment of a territorial sea with a breadth of 12 nautical miles. The declaration stated that provisions of the Peace Treaty pertaining to passage through the Strait and the Gulf were within the framework of Part III of the 1982 Convention. The declaration also mentioned that the general regime shall not affect the legal status of waters forming straits and the obligations of the Strait border state with regard to security and maintenance of order.[57] The declaration by itself is ambiguous,

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53 *Id.* See Lapidoth, *supra* note 4, at 100.

54 *Treaty of Peace*, *supra* note 17, at 532-39.

55 Lapidoth, *supra* note 4, at 105.

56 John Norton Moore, *The Arab-Israeli Conflict Volume IV: The Difficult Search for Peace* (1975-1988) 472 (American Society of International Law 1991).

57 *Law of the Sea Bulletin, Special Issue I* 2-5 (Office for Ocean Affairs and the Law of the Sea 1987).

seeming to state that the Peace Treaty regime of navigation is consistent with the 1982 Convention and that, at the very least, a transit passage regime would apply to both the Strait and the Gulf. The declaration was followed however, in December 1984, by an Israeli note to the Secretary-General of the U.N. which stated that the regime of "unimpeded and nonsuspendable freedom of navigation and overflight" under the 1979 Peace Treaty was both consistent with the 1982 Convention and was applicable in the Gulf of Aqaba and the Strait of Tiran.[58] The note also stated that Israel understood that Egypt's declaration upon ratification of the 1982 Convention was "consonant" with Israel's note.[59] It should be pointed out that Article 311 of the 1982 Convention allows states to enter agreements which are compatible with the Convention.[60] The Israeli note, which has not been refuted by Egypt, appears to further define Egypt's declaration upon ratification of the 1982 Convention, expressing that the parties agree that the Peace Treaty regime of "unimpeded and non-suspendable freedom of navigation" applied through the Strait of Tiran and in the Gulf of Aqaba.

In the Peace Treaty, the parties requested United Nations Forces and Observers to oversee certain aspects of the implementation of the Treaty and to help prevent any violations. Because the Soviet Union and other Arab states objected to the U.N. playing any role in the bilateral Peace Treaty, the Multinational Force and Observers (MFO) was created by Egypt, Israel and the United States to fulfill the functions that the Peace Treaty had foreseen for a U.N. force.[61] Paragraph 10(d) of the Protocol setting up the MFO lists one of the missions of the MFO as "Ensuring the freedom of navigation through the Strait of Tiran in accordance with Article V of the Treaty of Peace."[62] Since April 1982, three Italian

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58 *Law of the Sea Bulletin* 23 (Office of the Special Representative of the Secretary-General for the Law of the Sea 1985).

59 *Id.*

60 *See* Lapidoth, *supra* note 4, at 106.

61 21 I. L. M. 456. *See* M. Tabory, The Multinational Force and Observers in the Sinai: Organization, Structure, and Function 3 (1986).

62 Tabory, *supra* note 61, at 149.

minesweepers, as part of the ten nation MFO contingent, have patrolled the area of the Strait of Tiran in order to ensure the freedom of navigation guaranteed by the Treaty.[63]

Today, navigation through the Strait of Tiran and in the Gulf of Aqaba is controlled by the Egyptian-Israeli Peace Treaty. The specific legal definition of the words "freedom of navigation" under the Peace Treaty is essential to determining the regime applicable to the Gulf of Aqaba and the Strait of Tiran.[64] Some have concluded that the term freedom of navigation, repeated from Security Council Resolution 242 to the Camp David Framework to the Peace Treaty, indicates that the waterways should be subject to the liberal regime accorded to the high seas.[65] Others have argued that the term refers to general principles associated with transit passage as opposed to high seas freedom.[66]

Article 31 of the Vienna Convention on the Law of Treaties of 1969 discusses generally accepted rules associated with the interpretation of treaties. The Vienna Convention recognizes that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Among other factors "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account in interpreting the treaty.[67] It thus becomes essential to interpret the term "freedom of navigation" by examining the practice of the parties since the Peace Treaty came into force.

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63 *Id.* at 72. *But see Multinational Force and Observers, ANN. REP. OF THE DIR. GEN.*, at 3 (25 April 1991) where it is said that efforts are being made to modernize the Italian fleet with smaller and faster vessels which would be more cost efficient.

64 Lapidoth, *supra* note 4, at 100; *see* ElBaradei, *supra* note 1, at 550.

65 Lapidoth, *supra* note 4 at 102-03. Professor Lapidoth states that Egypt and Israel intended to apply the regime of "freedom of navigation in its traditional meaning, subject, of course, to the limitations imposed by the rules of international law and those that reasonably follow from the special configuration of the Strait and the Gulf," *Id.* at 103.

66 ElBaradei, *supra* note 1, at 550.

67 Vienna Convention on the Law of Treaties of 1969, *reprinted in* 8 I.L.M. 679.

III. SUBSEQUENT PRACTICE OF THE PARTIES AND ANALYSIS

A. Fishing boats / pleasure craft

Remarkably, few documented incidents of navigational restrictions in the Strait or the Gulf have occurred since 1982. Nearly all of the incidents involving Egyptian maritime authorities have been related to recreational boating rather than commercial shipping or naval forces. A recent incident occurred in June 1989, when an Egyptian patrol boat opened fire on an Israeli fishing boat near the resort of Taba. While Israeli authorities claimed that the fishing boat was about one mile from shore, the Egyptians said the boat was within 20 yards of the coast. The skipper of the boat related that he was ordered to stop by the Egyptians, but ignored the order because he had a person onboard who was without a passport. The Egyptians offered medical assistance and did not detain the boat.[68]

In April of 1989, four Israelis were detained by Egyptian authorities when their yacht sailed 200 yards into "Egyptian waters" without a permit. The Israelis were detained at a Coast Guard base for about six hours.[69]

In September 1988, Egyptian military officials apparently rammed and boarded an Israeli yacht with 35 persons onboard. The crew and tourists were detained and the yacht seized for about five hours. While the Egyptians accused the yacht of being within 300 yards of Coral Island, where a Coast Guard base is located, the Israeli captain claimed that he was over a mile from the island. On the same day, six other Israelis from the fishing trawler DAN were arrested for illegally fishing in Egyptian waters. The Egyptians denied seizing both vessels.[70]

An analysis of these incidents must begin by pointing out the factual and legal distinctions between pleasure vessels and commercial shipping. The Marine Encyclopaedic

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[68] *Egyptian Patrol wounds Israeli Fishermen*, UPI, June 3, 1989, *available in* LEXIS, NEXIS Library, UPI File.

[69] *The World*, LOS ANGELES TIMES, April 9, 1989, at 2.

[70] *Egypt Seizes Israeli Yacht, Holds 35 on Board 5 Hours*, LOS ANGELES TIMES, Sept. 10, 1988, at 3.

Dictionary Third Edition defines shipping as "the merchant shipping fleet of a country."[71] It is reasonable to assume that the Wars of 1956 and 1967 were sparked by Egypt's closing of the Strait of Tiran to Israeli shipping, which included warships and commercial ships, vital to that nation's economic, political and military interests, rather than the securing of pleasure boating. Although the 1982 Convention does not specifically mention boats or yachts, navigational regimes under the Convention generally apply to "all ships."[72] Historically, yachts were exempted from the special regulatory regime applied to merchant shipping, such as registration and marking. Yachtsmen, however, were expected to refrain from abusing the "official courtesies" granted to them with respect to the navigation of their pleasure craft.[73] It is useful in this analysis to look, by way of analogy, to admiralty jurisdiction, which has generally been determined by whether a vessel was in navigable waters or on the high seas. As applied in American law today, admiralty jurisdiction may attach to small recreational boats which are operating in waters which are physically connected to the oceans, the Gulf of Mexico or the Great Lakes, waters used as "highways in interstate or international commerce."[74] Because of the increasing activity of recreational boating in the Gulf of Aqaba, regulations or restrictions placed on Israeli yachts by Egyptian authorities are relevant and should be considered in our analysis.

Another preliminary issue is whether the acts of the Egyptian patrol boat authorities were actually state sanctioned activities or the acts of overzealous Coast Guard seamen. In the case of the shooting incident, the Egyptian government denied knowledge of any injuries and the affair was quietly handled through the diplomatic channels of both governments.[75] In the case of the tourist yacht, the Egyptians denied that the boat had been seized, saying the boat had been forced to go back because it "had sailed into Egyptian territorial waters

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71 The Marine Encylopaedic Dictionary 409 (3d ed. 1992)

72 Article 38 of the *1982 Law of the Sea Convention.*

73 T.J. PITTAR, *THE LAW AND PRACTICE REGULATING MERCHANT SHIPPING* 223 (Edwin T. Oliver 1882)

74 HERBERT L. MARKOW, *SMALL BOAT LAW* 2-9 - 2-11 (1977).

75 UPI, *supra* note 68.

without permission."[76] There are two significant points to be noted. First, the term "territorial waters" is used loosely here because Egypt's claim of twelve mile territorial waters would have placed the yacht in those waters well before the approach of within 300 yards of Coral Island. Second, in both incidents, the fact that Egypt claimed lack of knowledge of injuries or denied that a seizure took place would imply that Egyptian government authorities did not fully condone the actions of its Coast Guard.[77] In the past, if Egypt had sanctioned the shootings or the detentions, the events would most likely have been followed by clear statements to that effect by the Egyptian government. In all of these cases, the matters were classified as "routine" and were resolved quickly through diplomatic channels.

A question raised by the factual scenarios in these cases is whether the actions of Egyptian authorities were justified by legitimate security interests. As mentioned above, the 1982 Convention recognizes that innocent passage must not be "prejudicial to the peace, good order and security of the coastal state."[78] Article 25 of the 1982 Convention allows the coastal state to "take the necessary steps to prevent passage which is not innocent."[79] In the shooting incident, the skipper had refused to stop pursuant to Egyptian orders. The Egyptians had claimed that the boat was within 20 yards of its Coast Guard base at Coral Island.[80] Although, there was no justification for the shooting, it would certainly appear that the Egyptian authorities had valid security concerns in this case. In the case of the tourist yacht, the Egyptians claimed that the boat had come within 300 yards of Coral Island. In these cases, it would seem that the Coast Guard acted more out of concern for security / terrorist threats than to restrict navigation or prevent innocent passage.

With regard to fishing vessels, Egypt as a coastal state, has full authority to regulate that activity in her territorial sea. Under the 1982 Convention, as mentioned above, every

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76 *The World*, *supra* note 69, at 2.

77 See UPI, *supra* note 68; *see also Egyptians Fire on Israeli Boat in Gulf of Aqaba—Passengers*, Reuters News Agency, June 3, 1989.

78 *See supra* note 46.

79 Article 25 of the *1982 Convention on the Law of the Sea.*

80 *Egyptians Fire on Israel Boat in Gulf of Aguba-Passengers*, *supra* note 77.

state had a right to establish a territorial sea not exceeding twelve nautical miles from the state's baseline or low water line.[81] In the territorial sea, the coastal state has sovereign rights over "any fishing activity."[82] Therefore, in its claimed territorial sea, the Egyptians would have the right of regulation over fishing vessels. As mentioned above, the 1982 Convention allows the coastal state to take "necessary steps" to prevent passage which is inconsistent with the innocent passage regime of Article 25.[83] A coastal state would have the authority in its sovereign territorial waters, as in the Exclusive Economic Zone, to board and inspect vessels, and to arrest crews in order to ensure compliance with its fishing laws and regulations.[84] The Peace Treaty is silent on fishing and other economic activity in the Gulf of Aqaba. Without an agreement on this matter, the detention of fishing vessels and their crews by Egypt would be justified under Section 3 of Part II of the 1982 Convention.

The detention of the fishing boats and pleasure yachts in the above cases thus seems less related to restrictions on navigation than to Egypt's generally lawful exercise of its right to security and its authority to regulate fishing in its territorial sea. Specifically, the shooting incident involving the fishing boat appears related more to Egyptian Coast Guard security concerns than to navigational rights.

B. Environmental incidents

An interesting development in the Strait of Tiran has been the enforcement of environmental regulations by the Egyptian authorities over Israeli shipping. In one case, the Israeli tanker NYUTA and her crew were seized by the Egyptians in October of 1989 after the captain of one of the Italian MFO ships reported seeing an oil slick in the part of the Strait of Tiran where the NYUTA had recently passed. The NYUTA was the primary transport

81 Article 3 of the *1982 Convention on the Law of the Sea.*

82 *Id.* at Article 19(i).

83 *Id.* at Article 25.

84 *See Id.* at Article 2 and Article 73.

vessel for the majority of the oil imported into Israel from Egypt. The ship and the crew were detained for several weeks before being released.[85]

This incident did not involve any restriction on the freedom of navigation as envisioned by the Peace Treaty. The regime of unimpeded transit passage under the 1982 Convention allows states bordering straits to adopt laws and regulations relating to "(b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, (and) oily wastes . . . in the strait."[86] The second paragraph in Article 42 of the Convention makes it clear that this regulatory function by the bordering state is not in any way intended to affect or hinder the navigational right of transit passage.

Article 43 of the 1982 Convention declares that "User states and States bordering a strait should by agreement co-operate: . . . (b) for the prevention, reduction and control of pollution from ships." Since the Peace Treaty does not address this subject and there are no agreements in force regarding marine pollution among the coastal states in the Gulf of Aqaba or bordering the Strait of Tiran, the 1982 Convention will again be the focus of our analysis.[87]

Part XII of the 1982 Convention permits the physical inspection and, where appropriate, the detention of vessels when the coastal state believes there are clear grounds and clear objective evidence of a violation by a vessel navigating its territorial sea which may cause or threaten major damage to its coastline or related interests.[88]

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85 Larry Derfner, *Late-Night Negotiations Over NYUTA*, The Jerusalem Post, Nov 7, 1989.

86 Article 42 of the *1982 Convention on the Law of the Sea; see also* K. Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, 77 AM. J. INT'L L. 490, 496 (1983).

87 *See* Regional Convention for the Conservation of the Red Sea and the Gulf of Aden Environment for an example of a regional environmental agreement to which Egypt and Israel, for political reasons, are not parties, mentioned at 22 I.L.M. 219.

88 Article 220 of the *1982 Convention on the Law of the Sea.*

An analysis of the NYUTA affair leads one to conclude that it was related to Egypt's enforcement of its environmental regulations. In fact, one observer suggests that Egypt's "ecological law enforcement authorities" were responsible for the handling of the affair.[89] The only reasonable motive for the detention of the ship was Egypt's increasing environmental and economic concern for the protection of Sharm el-Sheikh's coral reefs reserve and related tourism. In fact, in 1989 Egypt and Israel, "in order to promote tourism", concluded an agreement on tourism in the South Sinai along with the agreement ending the dispute over Taba.[90] An Israeli investigation into the matter also concluded that the NYUTA captain had acted improperly by failing to fully cooperate when first probed by the Egyptian authorities, thus potentially escalating an inquiry into an arrest and seizure of the ship.[91]

The seizure of the NYUTA was a demonstration of Egypt exercising its right to regulate its territorial seas. Egypt is a state bordering the Strait of Tiran and under the 1982 Convention is allowed to regulate the prevention or control of pollution in the Strait.[92] Egypt would have to consider those waters part of her territorial sea in order to undertake a physical inspection or to detain a vessel which is violating those environmental regulations.[93] Based on Egypt's economic and environmental interests in Sharm el-Sheikh, a rational analysis of this case would conclude that Egypt considers the Strait to be part of its territorial sea which is subject to the allowable regulations of States bordering straits. The NYUTA incident should not be considered an incident of navigational restriction on Israeli shipping in the Strait of Tiran.

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89 Larry Defner, *Troubled Waters*, The Jerusalem Post, November 10, 1989.

90 *See* agreement at 28 I.L.M. 611.

91 Larry Derfner, *NYUTA Captain Failed to Cooperate Fully With Egyptians*, The Jerusalem Post, Dec. 10, 1989.

92 Article 2 of the *1982 Convention on the Law of the Sea*.

93 *See Id.* at Article 42.

C. U.N. maritime interception force

A very real restriction on navigation through the Strait of Tiran and the Gulf of Aqaba which falls outside of the Egyptian-Israeli Peace Treaty concerns the enforcement of the U.N. economic sanctions against Iraq. After Iraq invaded Kuwait in August 1990, the U.N. Security Council quickly adopted measures imposing economic sanctions on Iraq under Chapter VII of the U.N. Charter. On August 25 1990, the U.N. Security Council adopted Resolution 665, which foresaw the deployment of maritime forces to halt inbound and outbound shipping "in order to inspect and verify their cargoes and destinations . . ." and to enforce the sanctions against Iraq. One of the major terminals for shipping cargo was the Jordanian port of Aqaba, from which shipments were then transported by road or rail to Iraq. A Maritime Interception Force (MIF) was therefore set up in the Red Sea outside of the Strait of Tiran and the Gulf of Aqaba for the purpose of inspecting, boarding and, in some cases, diverting shipping from the Port of Aqaba.[94]

In the first seven months of the embargo, there were over 1675 inquiries of ships attempting to transit the Strait of Tiran with over 875 boardings.[95] The embargo continues to remain in effect at the time of this writing. Recently, Israel has complained to the United States through diplomatic channels that the embargo is having a disastrous effect on the port of Eilat's economy.[96] One writer has commented on the irony of the embargo "designed, at least in part, to protect Israel" and the unusual position occupied by the United States in enforcing the sanctions. The United States has traditionally recognized the importance of free navigation through the Strait of Tiran and has long defended Israel's right to unimpeded passage through the Strait. In support of Resolution 665, however, the United States routinely impedes shipping through the Strait of Tiran and often diverts even Israeli shipping toward the Suez Canal.[97]

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[94] DEPT. OF DEF., *Conduct of the Persian Gulf War*, 61-66 (1992).

[95] *Id.* at 72.

[96] Clyde Haberman, *Embargo on Iraq Backfires for Israel*, The New York Times, July 15, 1993 at A3.

[97] Michael Oren, *Risky Waters*, The Jerusalem Post, June 30, 1993.

There is little if any controversy that the United Nations' interception efforts in support of the sanctions against Iraq were legally authorized by the Security Council through its powers under Chapter VII of the U.N. Charter. The United States had initially justified any potential interception before the adoption of Resolution 665 by claiming that it was acting at the request of Kuwait under its Article 51 rights of collective self defense. One author has claimed that the interception efforts more closely resemble sanctions under Article 41 rather than Article 42 even though blockade is listed under the latter article.[98] The argument reasons that the interception rules of engagement were intended to avoid force and were in support of sanctions intended to prevent war. Under that theory, the activities of the MIF would not be seen in itself as a use of force.[99]

It has also been pointed out that, in accordance with traditional laws of war, interception activities do not take place in the Strait of Tiran itself. This is consistent with the principle that straits should not be used for belligerent purposes and with the regime of "continuous and expeditious transit of the Straits" as envisioned in Part III of the 1982 Convention, as discussed above.[100]

The U.N. interception efforts are legal Chapter VII actions which were authorized by the U.N. Security Council.[101] The Security Council is empowered by Chapter VII to ascertain whether a breach of the peace or an act of aggression has occurred and what steps are necessary in order to restore international peace and security.[102] The legal interception activities do not actually prevent navigation through the Strait of Tiran so much as they delay transit. Recently, however, the U.S. Navy has been diverting shipping away from the Strait

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98 L. E. Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World Order*, 53 LA. L. REV. 1191, 1240 (1993).

99 *Id.*

100 *See Id.* at 1226.

101 *See* J. H. McNeill, *Neutral Rights and Maritime Sanctions: The Effects of Two Gulf Wars*, 31 Am. J. Int'l L. 631, 641 (1991); David L. Peace, *Major Maritime Events in the Persian Gulf Between 1984 and 1991: A Juridical Analysis*, 31 Am. J. Int'l L. 545, 565 (1991).

102 *See* Peace, *supra* note 101, at 665.

of Tiran with containers stacked over three tiers high, in order to ensure the safety of inspections. This has been particularly damaging for the Israelis because they routinely pile the containers four rows or higher. The consequence is that Israeli shipping is taking the longer and more expensive route through the Suez Canal.[103]

The sanctions against Iraq have without doubt hindered the free navigation of all shipping through the Strait of Tiran. It is important, though, to look at the interception efforts as being in the best long-term interests of the international peace and security of all nations in the region, including the coastal states of the Gulf of Aqaba. In light of the repeated declarations by the United States that the Strait of Tiran is an international waterway and the promises of support in the Memorandum of Agreement after the signing of the Peace Treaty, it is truly ironic and, perhaps encouraging, that the first major impediment to Israeli shipping through the Strait of Tiran since the signing of the Peace Treaty, has been due to a legal American-sponsored international activity.

IV. CONCLUSION

It is important to note that the best evidence of an extremely liberal regime of navigation since 1982 is the absence of any major incident between Israel and Egypt in the Gulf of Aqaba and in the Strait of Tiran. The Deputy Director General of the MFO has recently concluded "that freedom of navigation at the Strait of Tiran has been ensured since 1982 in accordance with the Treaty."[104] Although the MFO conducts its business with regard to Treaty violations in confidence with Israel and Egypt, and hence information is scarce, it would appear that the most egregious incidents with regard to navigation were the ones enumerated above.

With the notable exception of the U.N. MIF activities, free navigation through the Strait of Tiran and in the Gulf of Aqaba has been, in practice, guaranteed to Israeli and other international shipping. When Egyptian authorities have detained or arrested Israeli ships or crews, it has been due to concern for environmental, economic and security interests rather

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[103] See Haberman, *supra* note 96.

[104] Letter from K. Scott Gudgeon, Deputy Director General, Multinational Forces and Observers (Oct. 20, 1993) (on file with author).

than any desire to restrict the navigation of Israeli shipping or pleasure craft. It is unknown whether the Egyptian Coast Guard in the above incidents were acting in conformity with official Egyptian government policy and it remains unclear whether the government actually approved of their actions.

Political communications between the governments of Egypt and Israel, which have been possible due to the establishment of diplomatic relations between the two countries, have played a role in maintaining a stable and peaceful "freedom of navigation" regime in the Gulf of Aqaba and through the Strait of Tiran. It is significant that all of the above incidents were quietly resolved through diplomatic efforts and today, detentions and seizures of Israeli boats and crews are rare indeed. A former Legal Adviser to the Israeli Foreign Ministry has pointed out that while Israel has considered the Gulf and Strait as high seas for navigational purposes, Israel "has not objected to Egyptian licensing procedures which require permits for fishing or recreational platform diving in Egyptian territorial waters."[105] Thus, the evolving relationship between Egypt and Israel and subsequent practice of the two parties will continue to further define the term of "freedom of navigation" as stated in the 1979 Peace Treaty.

The Gulf of Aqaba and the Strait of Tiran have been recognized as "international waterways" by major maritime states since the 1950's. The Peace Treaty, in accordance with Security Council Resolution 242, embodies that regime of navigation in the Gulf and Strait which was affirmed by the United Nations Security Council. As mentioned above, the Peace Treaty's liberal regime is valid and compatible with the 1982 Convention. Thus, the "freedom of navigation" regime of the Peace Treaty will supplant the 1982 Convention's regime of non-suspendable innocent passage when that Convention comes into force.[106]

Any examination of "freedom of navigation" pursuant to the Peace Treaty would not be complete without mentioning that Saudi Arabia and Jordan, the other two Gulf of Aqaba coastal states, do not have any agreements with Israel regarding navigation in the Gulf and through the Strait. At the present, those two Arab states do not even officially recognize Israel. If Jordan and Saudi Arabia ratify the 1982 Convention, when it comes into effect, they will be bound to recognize the Convention's navigation regimes as applicable to ***all*** states.

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105 Telephone Interview with Robbie Sable, former Legal Advisor, Foreign Ministry, State of Israel (Nov. 19, 1993).

106 See Lapidoth, *supra* note 65.

In the meantime, those navigation regimes in the 1982 Convention, widely regarded as customary international law, are binding on all of the coastal states in the Gulf of Aqaba.[107] The preservation of "freedom of navigation" in the Gulf of Aqaba and through the Strait of Tiran in the future, however, will depend upon the willingness and ability of all of the coastal states to co-exist in peace.[108]

[107] Professor John Norton Moore, Lecture at Georgetown University Law Centre (Oct. 8, 1993) (notes maintained by author). *See also* Danseyar, *supra* note 1, at 158.

[108] *See* Danseyar, *supra* note 1, at 172-73.

CONSTITUTIONAL LAW

Self Incrimination: It Now Takes A Law Degree to Know How to Properly Invoke One's Right to Counsel.

Davis v. United States, 114 S. Ct. 2350 (1994)

Lieutenant Commander Scott M. Lang, JAGC, USN *

I. INTRODUCTION AND FACTS

The United States Supreme Court has further eroded the bright line rules established in *Miranda*[1] and *Edwards*[2] by holding that government agents may continue to question and have no obligation to clarify an ambiguous request for counsel made during a custodial interrogation.[3] The Court has imposed a "precise wording" burden on suspects attempting to

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1 Miranda v. Arizona, 384 U.S. 436 (1966). In *Miranda*, the Supreme Court established procedural safeguards to protect one's right against self incrimination during a custodial interrogation. *Id.* at 467-73. For a full discussion of the procedural safeguards established to protect Fifth Amendment rights during a custodial interrogation, see *infra* notes 32-38 and accompanying text.

2 Edwards v. Arizona, 451 U.S. 477 (1981). The Supreme Court established a bright line rule that police must cease questioning after an individual has invoked his or her right to counsel during a custodial interrogation. *Id.* at 484-87.

3 Davis v. United States, 114 S. Ct. 2350 (1994). Davis was a sailor in the United States Navy who was charged with murder under Article 118 of the Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 918 (1988). *Id.* at 2352-53. The Supreme Court declined to address the issue of whether the privilege against self incrimination or the procedural *Miranda* safeguards apply to the military. *Id.* at 2354 n.*. The parties did not contest the applicability of these protections as they considered them firmly rooted within the military justice system. *See* UCMJ art. 36(a), 10 U.S.C. § 836(a) (1988); *Manual for Courts-Martial*, United States, Mil.R.Evid. 304(a), 304(c)(3) (1984) [hereinafter MCM].

invoke their right to counsel.[4] This will most likely result in extensive litigation concerning whether the words uttered by a suspect amount to an equivocal or unequivocal request for counsel.[5] The Court failed to adopt the approach previously used by the majority of circuit courts and the Court of Military Appeals.[6] This approach permitted a government agent to only ask clarifying questions in response to an ambiguous request for counsel.[7]

Keith Shackleton, a sailor in the United States Navy, was beaten to death with a pool cue on October 2, 1988.[8] His body was discovered on the morning of October 3 on a loading dock behind the Charleston Naval Base commissary.[9] The Naval Investigative Service (NIS) was tasked with investigating this homicide.[10]

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4 *See Davis*, 114 S. Ct. at 2355 (holding that suspect's reference to attorney that merely might be understood as invocation of counsel rights is insufficient).

5 An unequivocal request for counsel requires that the interrogation be terminated. *Edwards*, 451 U.S. at 484-85. An equivocal request for counsel places no burdens or constraints on the interrogator. *Davis*, 114 S. Ct. at 2356.

6 *Davis*, 114 S. Ct. at 2356. Although recognizing that it is "good police practice" for interviewing officers to clarify ambiguous counsel requests, the Court refused to impose this burden. *Id.*

On October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995, which redesignated the United States Court of Military Appeals (CMA) as the United States Court of Appeals for the Armed Forces (CAAF). See Nat'l Def. Auth. for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (to be codified at 10 U.S.C. § 941).

7 For a discussion of the handling of ambiguous requests for counsel prior to *Davis*, see *infra* notes 90-92 and accompanying text.

8 *Davis*, 114 S. Ct. at 2352-53. The majority incorrectly identified the victim as Keith Shackleford. *Compare id.* with *id.* at 2359 (Suter, J., concurring); Joint Appendix, Davis, 114 S. Ct. 2350 at 165 (No. 92-1949) (copy of NIS document identifying victim as Keith Scott Shackleton).

9 *Davis*, 114 S. Ct. at 2353.

10 *Id.* NIS was recently renamed the Naval Criminal Investigative Service. It is responsible for investigating major crimes committed by Department of the Navy personnel. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5520.3B, CRIMINAL AND SECURITY INVESTIGATIONS AND RELATED ACTIVITIES WITHIN THE DEPARTMENT OF THE NAVY (04 Jan. 1993).

The investigation gradually began to focus on another sailor, Operations Specialist Seaman Apprentice Robert Davis.[11] NIS discovered through a series of screening interviews that Davis was telling others that he was involved in the killing or had conveyed intimate details concerning the beating.[12]

NIS interviewed Davis on October 20, 1988. The interview was conducted on the USS MAHAN, Davis's assigned military duty station.[13] Davis was very cooperative during this thirty-minute interview.

Davis was interrogated by NIS on November 4, 1988.[14] Prior to the interrogation, the accused was advised of and subsequently waived his rights under *Miranda* and Article 31 of the Uniform Code of Military

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11 *Davis*, 114 S. Ct. at 2353. NIS determined that Davis was shooting pool and betting at the club with the deceased on the night in question and that Davis owned his own pool cue. *Id.*

12 *Id.*

13 Davis was a crewmember of the USS MAHAN, a guided missile destroyer. United States v. Davis, 36 M.J. 337, 338 (C.M.A. 1993), *aff'd*, 114 S. Ct. 2350 (1994). Davis was restricted to the limits of the ship prior to and during this interview because of prior misconduct (unauthorized absence). *Id.* at 339. The NIS agents did not advise Davis of his rights under Article 31 of the UCMJ prior to conducting this interview because they did not suspect him of any offense. *Id.* at 339.

14 According to Davis, he was escorted in handcuffs from a Naval Hospital psychiatric ward to the NIS office where he remained handcuffed for the duration of the interrogation. Petitioner's Opening Brief at 8, *Davis*, 114 S. Ct. 2350 (No. 92-1949).

Justice.[15] Approximately an hour and a half into the interrogation, Davis stated, "Maybe I should talk to a lawyer."[16]

Special Agent Sentell of NIS continued discussions with Davis in an attempt to clarify if he was asserting his right to counsel.[17] She asked Davis if he was asking for a lawyer or just making a comment about a lawyer.[18] According to the agent, Davis responded, "No I'm not asking for a lawyer—no I don't want a lawyer."[19]

After a short break, the NIS agents briefly reminded Davis of his Article 31 and *Miranda* rights and continued the interrogation.[20] An hour later, Davis exclaimed, "I think I want a lawyer before I say anything else." The interrogation was terminated.[21]

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15 Article 31(b) states:

> No person subject to this chapter may interrogate or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

UCMJ Article 31(b), 10 U.S.C. § 831 (1988).

16 *Davis*, 114 S. Ct. at 2353. Davis contends that the phraseology he used was, "Well, I'd like a lawyer." *Davis*, 36 M.J. at 340.

17 *Davis*, 114 S. Ct. at 2353. Special Agent Sentell testified that after Davis stated, "Maybe I should talk to a lawyer," she advised him that she was not there to violate his rights and that if he wanted a lawyer, the questioning would cease. *Id.*

18 *Id.*

19 *Id.*

20 *Id.* The agent testified that she briefly reinformed Davis of his rights to remain silent and to counsel. *Id.*

21 It is unclear from the opinion if the interview was terminated at this point because NIS agents considered this to be an unequivocal assertion of counsel rights.

At trial, the military judge denied Davis's motion to suppress the statements he made during the November 4 interrogation.[22] The military judge determined the initial phraseology used by Davis during the interrogation was not a request for counsel.[23] The Court of Military Appeals ultimately affirmed this holding, finding that Davis's ambiguous request did not serve to invoke his right to counsel and that the NIS agents responded properly in seeking to clarify the remark.[24]

II. THE EVOLUTION OF THE RIGHT TO COUNSEL

A. Differentiating the Right to Counsel under the Sixth Amendment and the Fifth Amendment Procedural Safeguards Established by the Judiciary

The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right "to have the assistance of counsel for his defence."[25] This right attaches only at the initiation of adversary criminal proceedings.[26] Within the military context, the Sixth Amendment right to

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22 *Davis*, 114 S. Ct. at 2353. The military judge made a specific finding of fact in which he rejected Davis's assertion that he initially told the NIS agents "I'd like a lawyer." United States v. Davis, 36 M.J. 337, 341 (C.M.A. 1993), *aff'd*, 114 S. Ct. 2350 (1994).

23 *Davis*, 36 M.J. at 341-42.

24 *Id.* The Court of Military Appeals applied the clarification approach which was then being utilized in the majority of federal circuit courts. *See, e.g.*, United States v. March, 999 F.2d 456, 461-62 (10th Cir.), *cert. denied*, 114 S. Ct. 483 (1993); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1472 (11th Cir.), *cert. denied*, 113 S. Ct. 436 (1992); United States v. Gotay, 844 F.2d 971, 975 (2d. Cir. 1988); United States v. Fouche, 833 F.2d 1284, 1287 (9th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); United States v. Cherry, 733 F.2d 1124, 1130 (5th Cir. 1984); Nash v. Estelle, 597 F.2d 513, 517 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979). For a full discussion of the three approaches for handling ambiguous counsel requests, see *infra* notes 90-93 and accompanying text.

25 U.S. CONST. amend. VI.

26 McNeil v. Wisconsin, 501 U.S. 171 (1991); United States v. Gouveia, 467 U.S. 180, 188 (1984); Kirby v. Illinois, 406 U.S. 682, 689 (1972) (attaches at or after initiation of proceedings either by way of formal charge, preliminary hearing, indictment, information or arraignment); Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (attaches

counsel arises with the preferral of charges against an accused or the imposition of pre-trial restraint.[27]

The underlying policy behind the Sixth Amendment right to counsel is that it would be unfair to have an unaided layman (accused) confront his / her expert adversary (the government) after the adverse positions of the two parties have solidified with respect to a particular alleged crime.[28] A just system does not require a defendant to face the prosecutorial forces of organized society and the intricacies of substantive and procedural criminal law without the aid of an advocate trained to respond within this system.[29]

The Fifth Amendment makes no specific reference to a right to counsel.[30] It does however state that no person "shall be compelled in any criminal case to be a witness against himself."[31]

In *Miranda v. Arizona*,[32] the Supreme Court implemented procedural safeguards to protect a suspect's Fifth Amendment privilege against self incrimination while being subjected to a custodial interrogation.[33] The Court reasoned that the environment of a custodial interrogation is inherently intimidating and that without proper procedural

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at preliminary hearing); White v. Maryland, 373 U.S. 501-60 (1963) (attaches at initial appearance).

27 United States v. Sager, 36 M.J. 137, 142 (C.M.A. 1992); United States v. Wattenbarger, 21 M.J. 41 (C.M.A. 1985), *cert. denied*, 477 U.S. 904 (1986); United States v. Hanes, 34 M.J. 1168, 1172-74 (N.M.C.M.R. 1992).

28 *McNeil*, 501 U.S. at 177-78.

29 *Gouveia*, 467 U.S. at 188.

30 U.S. CONST amend V.

31 *Id.*

32 384 U.S. 436 (1966).

33 *Id.* at 467-73. The Court held that suspects subjected to custodial interrogation must be informed: that they have the right to remain silent; that anything they say can be used against them; that they have the right to consult with an attorney and have that attorney present during interrogation; and that if indigent, an attorney will be appointed to represent them. *Id.* at 467-73.

safeguards, no statement obtained from a defendant can truly be a product of free choice.[34] The fear of persistent investigators wearing down and badgering suspects until they confessed was cause for great concern.[35]

The Court prescribed a prophylactic rule that all criminal suspects subjected to custodial interrogation must be informed, among other things, that they have a right to consult with counsel and have counsel present throughout the interrogation.[36] The Court cases emphasized that the assertion of the right to counsel was a significant event and that once exercised, "the interrogation must cease until an attorney is present."[37] The Court also placed an affirmative burden on the government to show that if counsel was not present at an interrogation, it was only because the suspect knowingly and intelligently waived the right to have counsel present.[38]

The custodial interrogation of Davis was conducted prior to the preferral of any charges.[39] Therefore, his counsel rights under the Sixth Amendment had not been triggered when he uttered the now notorious line, "Maybe I should talk to a lawyer."[40] The remainder of this Note will be dedicated to an analysis of the applicable Fifth Amendment procedural safeguards.

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34 *Id.* at 445-58. The Court placed an affirmative burden on the government to show that proper warnings and waiver occurred. *Id.* at 468-69. Absent such warnings there is an irrebuttable presumption that a suspect's waiver occurred in violation of the suspect's Fifth Amendment rights. *Id.*

35 Minnick v. Mississippi, 498 U.S. 146, 150 (1990) (citing Michigan v. Harvey, 494 U.S. 344, 350 (1990)).

36 *Miranda*, 384 U.S. at 467-73.

37 *Id. See also* Fare v. Michael C., 442 U.S. 707, 719 (1979) (viewing accused's request for attorney during custodial interrogation as per se invocation of Fifth Amendment rights requiring all interrogation to cease).

38 *Miranda*, 384 U.S. at 475.

39 Davis v. United States, 114 S. Ct. 2350, 2354 (1994).

40 For a full discussion of the different protections of the right to counsel under the Sixth Amendment and the Fifth Amendment *Miranda* entitlement, see James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 980-95 (1986).

B. The Bright Line Rule of *Edwards* and its Progeny

The Supreme Court established a bright line rule as to the restrictions on government investigators once suspects invoked their right to counsel during a custodial interrogation. In *Edwards v. Arizona,*[41] the Court stated that an accused who has expressed a desire to deal with police only through counsel is not subject to further interrogation until counsel is made available to him.[42] The only exception is when the accused himself initiates further communications or exchanges with the police.[43] The *Edwards* Court did not address ambiguous requests for counsel as the Court found the terminology used by the defendant to be unequivocal.[44]

In *Oregon v. Bradshaw,*[45] the Court examined the issue of waiver of counsel rights subsequent to invocation. The Court established a two-step analysis that requires a determination of whether (1) the accused initiated further conversations with interrogators, and if so whether, (2) this constituted a knowing and intelligent waiver of *Miranda* rights.[46]

The opportunity to shed light on the handling of ambiguous requests for counsel arose in *Smith v. Illinois*[47] and *Connecticut v. Barrett.*[48]

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41 451 U.S. 477 (1981).

42 *Id.* at 481-87. The Court ruled that when Edwards told detectives, "I want an attorney before making a deal," the detectives were required to cease questioning and were not permitted to reinitiate interrogation the next morning. *Id.* at 484-85.

43 *Id.* The court stated that the focus is on whether *the defendant* understands his right to counsel and intelligently and knowingly relinquishes it. *Id.* at 484.

44 *Id.* at 482. In *Miranda,* the Court broadly stated that interrogation must cease if a suspect indicates "in any manner" and at "any stage of the process" that the suspect desires counsel. 384 U.S. 436, 444-45. The *Edwards* Court narrowed this language by declaring simply that if a suspect requests counsel, the interrogation must cease. *Edwards,* 451 U.S. at 484-87.

45 462 U.S. 1039 (1983).

46 *Id.* at 1044-46. The Court found a valid reinitiation and waiver when the accused asked interrogators, "Well what is going to happen to me now?"

47 469 U.S. 91 (1984).

Although recognizing the diverse handling of the issue among the various lower courts,[49] the Supreme Court chose not to meet this issue head on.[50]

The defendant in *Smith*, after being informed of his counsel rights, replied, "Uh yeah. I'd like to do that."[51] The Court found no ambiguity in this request.[52] Applying the bright line rule of *Edwards*, the Court declared that the further reading of *Miranda* rights and clarifying questions by detectives violated the defendant's Fifth Amendment rights.[53] In assessing whether the accused invoked his right to counsel, the Court cited the broad language of *Miranda* that recognized an invocation if an accused "indicated in any manner and at any stage of the process that he wished to speak to an attorney before speaking."[54]

The Court again skirted the issue of ambiguous requests for counsel in *Connecticut v. Barrett*.[55] In *Barrett*, the defendant agreed to waive his

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48 479 U.S. 523 (1987).

49 *Smith*, 469 U.S. at 95-96.

50 *Barrett*, 479 U.S. at 529-30 (rejecting view accused's request was ambiguous); *Smith*, 469 U.S. at 96-97 (finding nothing stated by accused to have suggested equivocation).

51 *Smith*, 469 U.S. at 93.

52 *Id.* at 96. Justice Rehnquist however criticized the majority for merely focusing on the seven words uttered by the accused in determining if an unequivocal request for counsel was made. *Id.* at 100-02 (Rehnquist, J., dissenting). Viewing this approach as "slicing a legal abstraction thinner than common sense will permit," he urged that the entire context and surrounding circumstances be examined to determine if a request was unequivocal. *Id.* at 102 (Rehnquist, J., dissenting).

53 *Smith*, 469 U.S. at 98-100. It is improper to try to transform an unambiguous counsel request into an ambiguous request by examining an accused's responses after an unequivocal assertion of counsel rights. *Id.* at 97.

54 *Id.* at 95 (quoting Miranda v. Arizona, 384 U.S. at 444-45).

55 479 U.S. 523, 529-30 n.3 (1987). The Court found that Barrett's statements were not ambiguous or illogical and were simply a partial assertion of his right to counsel. *Id.* at 529-30. *But see id.* at 534 (Brennan, J., concurring in judgment) (believing partial invocation of right to counsel invariably will be ambiguous); *id.* at 537 (Stevens, J., dissenting) (maintaining respondent's request for counsel was full and unequivocal

right to silence but requested the presence of an attorney before providing a written statement to the police.[56] In its opinion, the Court recognized the "settled approach" that a defendant's request for counsel is to be given a broad rather than a narrow interpretation.[57] However, the Court found that the defendant made clear his intentions regarding only limited assistance from counsel and that the police honored this request.[58] Rather than expanding the bright line rule of *Edwards* to include what was arguably an ambiguous request for counsel, the Court found that no further interpretation of the accused's statement was necessary because "ordinary people" would not have viewed the defendant's words as ambiguous.[59]

The Supreme Court provided a broad and expansive view of the protection of *Edwards* in *Arizona v. Roberson*[60] and *Minnick v. Mississippi*.[61]

The *Roberson* Court took the bright line rule of *Edwards* and declared even greater ramifications when suspects assert their right to counsel.[62] The Court found a presumption that when suspects request counsel under *Miranda*, they are declaring that they thereafter need the assistance of counsel in dealing with the pressures of any custodial

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as request made in *Edwards*).

56 *Barrett*, 479 U.S. at 525.

57 *Id.* at 529 (quoting Michigan v. Jackson, 475 U.S. 625, 633 (1986)).

58 *Id.* at 529-30. *But see id.* at 534 (Brennan, J., concurring in judgment) (opining any plain reference, however glancing, to a need for representation must result in the cessation of questioning).

59 *Id.* at 529. The Court in *Barrett* appeared to be creating an objective standard, thereby taking away the focus from the perspective of the accused as delineated in *Edwards*.

60 486 U.S. 675 (1988).

61 498 U.S. 146 (1990).

62 *Roberson*, 486 U.S. at 682-85. In *Roberson*, the accused unequivocally asserted his right to counsel but was interrogated three days later concerning an unrelated crime. *Id.* at 678.

interrogation.[63] Therefore, the police are precluded from questioning a suspect about even independent unrelated offenses after a counsel request.[64]

Again citing the clarity and certainty in the application of the *Edwards* rule, the Court held in *Minnick v. Mississippi* that once counsel rights are asserted, police are precluded from reinitiating questioning of a suspect even if the suspect has consulted with an attorney in the interim.[65] The Court found that consultation with counsel was not enough to counteract the coercive pressures of persistent investigators.[66] Only the physical presence of counsel was deemed satisfactory to protect an accused's rights at subsequent police-initiated questioning.[67]

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63 *Id.* at 683. The Court emphasized that its holding would continue to advance the virtues of the bright line rules established in *Miranda* and *Edwards*. *Id.* at 681. The Court reasoned that this clear guidance would also benefit law enforcement officials by clearly delineating what they can and cannot do while conducting a custodial interrogation. *Id.* The Court also attached no significance to the fact that the second interrogator was unaware of the prior rights assertion. *Id.* at 687.

64 *Id.* at 685. The Court distinguished invoking the right to counsel from invoking the right to remain silent. The invocation of the right to counsel raises a presumption that a suspect is unable to proceed without a lawyer's advice. *Id.* at 683. This same presumption does not exist when suspects invoke their right to remain silent. *See* Michigan v. Mosley, 423 U.S. 96, 103-04 (1975).

65 *Minnick*, 498 U.S. at 150-56. In *Minnick*, the accused asserted his right to counsel and spoke with his counsel two or three times. *Id.* at 149. After speaking with counsel, the police reinitiated the interrogation without informing Minnick's attorney or providing him with an opportunity to be present. *Id.*

66 *Id.* at 154-55. The Military Rules of Evidence were recently amended to incorporate the holdings in *Minnick* and McNeil v. Wisconsin, 501 U.S. 171 (1991). See *MCM*, *supra* note 3, Mil.R.Evid. 305(e) (c7, 15 November 1994).

67 *Id.* at 153. The Court took the opportunity to clarify the language in *Edwards* that the police may not reinterrogate "until counsel has been made available." *Id.* The Court stated that a full and fair reading of *Edwards* creates the requirement of the actual presence of counsel before interrogation can be reinitiated. *Id.* This is the only way to counteract the persistent attempts of police officials to persuade suspects to waive their rights. *Id.* For a further analysis of this issue, see Arizona v. Roberson, 486 U.S. 675, 680 (1988); Shea v. Louisiana, 470 U.S. 51, 52 (1985); Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983).

In his candid dissenting opinion, Justice Scalia forcefully opined that the Court had overstepped its authority in the application of its prophylactic rules and that too great a burden was being placed on law enforcement officials.[68] He stated that confessions were a necessary and integral part of a just system and that the Court should not create rules and barriers such that uncoerced confessions are viewed as mistakes.[69] The implication was that enough was enough in protecting Fifth Amendment rights and that the scales had improperly tipped on the side of the criminal defendant.

C. The military's treatment of *Edwards*

The Court of Military Appeals first examined the *Edwards* holding in *United States v. Goodson*.[70] Stating that *Edwards* was inapplicable to the particular facts of that case, the court held that suspects cannot validly invoke their right to counsel until after they have been advised of their rights pursuant to the commencement of an interrogation.[71]

One year later, the Court of Military Appeals sought to clarify that *Edwards* and its protections were directly applicable in the military setting.[72] The court stated that regardless of the guidelines and mandates

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68 *Minnick*, 498 U.S. at 161 (Scalia, J., dissenting) (improper to foreclose state from opportunity to show suspect voluntarily waived the right to counsel after consulting with attorney).

69 *Id.* at 162-63, 166 (Scalia, J., dissenting) (prophylactic rules established by Court have produced "veritable fairyland castle of imagined constitutional restrictions on law enforcement").

70 18 M.J. 243 (C.M.A. 1984), *judgment vacated*, 471 U.S. 1063 (1985). In *Goodson*, the accused was apprehended and taken to the police station where he waited nine hours before an interrogation commenced. *Id.* at 245. Despite the accused requesting an attorney three times while in custody, the Court of Military Appeals held that his subsequent confession was admissible. *Id.* at 247-50.

71 *Id.* at 247-48. The court recognized a Sixth Amendment right to counsel after pretrial arrest, restriction or confinement. *Id.* at 249. The nine hour period when the accused was detained at the police station prior to interrogation was not however sufficient to trigger this right. *Id.* Upon remand from the Supreme Court, the Court of Military Appeals held that Goodson had properly invoked his right to an attorney which remained effective during his questioning by a second investigator. 22 M.J. 22 (C.M.A. 1986).

72 United States v. Harris, 19 M.J. 331, 338 (C.M.A. 1985).

of Military Rule of Evidence 305, *Edwards* would be applied by military tribunals.[73]

Gradually the military courts began to whittle away at the bright line protection of *Edwards*. This decay began with the creation of the "overseas exception." In *United States v. Vidal*,[74] the Court of Military Appeals held that a request for counsel made to foreign authorities will not taint a later statement made to American police after a proper rights advisement.[75] It was determined that an accused's assertion of a right to counsel made in connection with a foreign investigation may simply be the result of having an unfamiliarity with the foreign system.[76]

Prior to the Supreme Court's holding in *Davis*, the military courts had chosen the "clarification approach" as the proper response to an equivocal request for counsel.[77] Under this approach, investigators were permitted solely to seek clarification of the ambiguous request.[78] They

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73 *Id.* The court suppressed the accused's confession and found it irrelevant that the interrogator who obtained the confession was unaware of the accused's prior request for counsel. *Id.* at 338.

74 23 M.J. 319 (C.M.A.), *cert. denied*, 481 U.S. 1052 (1987).

75 *Id.* at 323-24 (asserting rights to foreign authorities has no bearing on willingness to speak to American investigators).

76 *Id.* at 323. *See also* United States v. Hinojosa, 33 M.J. 353 (C.M.A. 1991) (requesting and then meeting with attorney through foreign officials does not trigger *Edwards* protections); United States v. Coleman, 26 M.J. 451 (C.M.A. 1988), *cert. denied*, 488 U.S. 1035 (1989) (holding that Army CID could interrogate despite having knowledge of accused's request for counsel made to foreign police officials during their independent investigation).

77 United States v. Davis, 36 M.J. 337, 341 (C.M.A. 1993), *aff'd*, 114 S. Ct. 2350 (1994) (ambiguous request for counsel must be clarified before interrogation may continue); United States v. McLaren, 38 M.J. 112 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 1056 (1994). *But see* United States v. Smith, 30 M.J. 694, 696 (A.C.M.R. 1990) (viewing ambiguous request for counsel as a rights invocation).

78 *Davis*, 36 M.J. at 341. *See* United States v. Whitehead, 26 M.J. 613 (A.C.M.R. 1988) (telling accused after he requested counsel that there was no need for attorney if he had done nothing wrong exceeded boundaries of mere clarification).

however were not permitted to attempt to dissuade suspects from invoking their rights.[79]

The military courts have placed a great burden on suspects to use the "proper" words and actions to unequivocally invoke their right to counsel.[80] The Court of Military Appeals however recently cautioned that the words uttered are not in and of themselves dispositive.[81] Military courts must also evaluate the context in which the words were spoken.[82]

Recently, the Court of Military Appeals has been prone to either limit the breadth of *Edwards* or find exceptions to it. In *United States v. Moreno*,[83] subsequent to preferral of charges and after an unequivocal assertion of counsel rights, a state social worker interviewed the defendant.[84] During this interview the defendant confessed to abusing his fourteen year old stepson.[85] The court found no Sixth Amendment violations and did not even address the *Edwards* bright line rule.[86] The court concluded that the social worker was not acting as an agent of the

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79 *McLaren*, 38 M.J. at 115-16; *Davis*, 36 M.J. at 341; *Whitehead*, 26 M.J. at 619.

80 *McLaren*, 38 M.J. at 115 (refusing to disturb trial judge holding that "I think I want a lawyer" was equivocal); *Davis*, 36 M.J. at 342 (finding phrase "Maybe I should talk to a lawyer" needing clarification); *Whitehead*, 26 M.J. at 617 (finding phrase "Maybe I should get a lawyer" equivocal).

81 *McLaren*, 38 M.J. at 115.

82 *Id.* *See also* Smith v. Illinois, 469 U.S. 91, 101 (1984) (Rehnquist, J., dissenting) (words spoken are rarely crystal clear in and of themselves).

83 36 M.J. 107 (C.M.A. 1992). For a full discussion of the impact of the *Moreno* holding, see Captain Joseph L. Falvey (USMC), *Health Care Professionals and Rights Warnings*, 40 NAV. L. REV. 173 (1992).

84 *Moreno*, 36 M.J. at 109-10.

85 *Id.*

86 *Id.* at 112-19.

investigators and therefore did not violate the accused's constitutional rights.[87]

Similarly, the Court of Military Appeals has utilized a more stringent application of the *Edwards* rule by requiring suspects to properly time the assertion of their right to counsel. In *United States v. Schroeder*,[88] the court held that requesting the assistance of counsel prior to rights advisement and prior to the commencement of an interrogation did not trigger the *Edwards* protections.[89]

IV. ANALYSIS OF *DAVIS*

Before the Supreme Court's decision in *Davis*, the various lower courts had advanced three approaches for handling ambiguous or equivocal requests for counsel. Some jurisdictions had required all questioning to cease if the suspect mentioned counsel in any manner or context.[90] Other jurisdictions had held that investigators must cease their interrogation after an ambiguous request for counsel but may ask narrow questions in an attempt to clarify the suspect's desires concerning counsel.[91] This approach

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87 *Id.* at 113-20. The court found the social worker to be acting independently despite the fact that she videotaped her interview with the alleged victim in response to Army CID's request and was told prior to interviewing the accused that the Army CID case was closed and had been forwarded to prosecutors. *Id.*

88 39 M.J. 471 (1994).

89 *Id.* The court made this determination despite the fact that the accused had been apprehended and maced prior to asking for counsel. *See also* United States v. Sager, 36 M.J. 137, 144 (C.M.A. 1992) (suspect telling investigator during background inquiry that he was represented by civilian counsel was a spontaneous and unsolicited disclosure and not a rights invocation). *But cf.* United States v. Jordan, 38 M.J. 346, 350 (C.M.A. 1993) (Sullivan C. J., dissenting), *cert. denied*, 114 S. Ct. 1217 (1994) (through his words and actions an accused can make a functionally equivalent assertion of counsel rights that should be recognized).

90 Maglio v. Jagio, 580 F.2d 202, 205 (6th Cir. 1978); People v. Superior Court of Mono County, 542 P.2d 1390 (Cal. 1975), *cert. denied*, 429 U.S. 816 (1976).

91 United States v. March, 999 F.2d 456, 461-62 (10th Cir.), *cert. denied*, 114 S. Ct. 483 (1993); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1472 (11th Cir.), *cert. denied*, 113 S. Ct. 436 (1992); United States v. Gotay, 844 F.2d 971, 975 (2d. Cir. 1988); United States v. D'Antoni, 856 F.2d 975, 980-81 (7th Cir. 1988); United

was in use in the majority of jurisdictions. The Supreme Court chose the third approach. Under this approach, unless the suspect meets the threshold of making an unequivocal request for counsel, investigators face no restrictions and are permitted to continue the interrogation.[92] Although delineating that it would be "good police practice" to seek clarification of an ambiguous request, the Supreme Court chose not to impose this burden on the government.[93]

The NIS agents acted appropriately and a proper result was reached in *Davis*.[94] However, the Supreme Court downplayed too many important factors and implemented the wrong approach. The government did not even argue for such an abridgment of a defendant's rights but rather urged the court to follow the Court of Military Appeals and apply the clarification approach.[95] The government reasoned that this approach would best balance the defendant's rights against self incrimination with the government's need to obtain confessions as an effective means of law enforcement.[96]

The Supreme Court gave little weight or credence to the context in which the accused stated, "Maybe I should talk to a lawyer." Davis had spent the prior two weeks in a psychiatric hospital and sat handcuffed

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States v. Fouche, 776 F.2d 1398, 1405 (9th Cir. 1985).

92 *See* Eaton v. Commonwealth, 397 S.E.2d 385 (Va. 1990), *cert. denied*, 112 S. Ct. 88 (1991).

93 *Davis*, 114 S. Ct. at 2356 (clarifying question will ensure suspects get attorney if they so desire and will minimize second guessing by courts as to meaning of suspects' original statement).

94 The NIS agents did seek clarification of Davis's original ambiguous request and ceased questioning when Davis made what was possibly interpreted as an unequivocal request for counsel. *Id.* at 2353.

95 Brief for United States at 19-30, Davis v. United States, 114 S. Ct. 2350 (No. 92-1949).

96 *Id.* at 25-30; *see also Davis*, 114 S. Ct. at 2358-60 (Souter, J., concurring) (clarify ambiguous counsel requests).

throughout the entire interrogation.[97] Instead the Court appeared to focus solely on the words spoken by the defendant.[98] Additionally, the Court made no mention of the fact that Davis was a junior military member who had been trained to follow the orders of his superiors and was therefore more apt to be influenced by the pressures of the custodial interrogation.

The Court in *Davis* recognized the importance of the requirement for a knowing and intelligent waiver of one's *Miranda* rights.[99] Additionally the Court recognized that police were capable of badgering suspects until they waive their previously asserted rights.[100] Despite these concerns, the Court has placed the suspect in the untenable position of needing to assert the right to counsel in unambiguous and unequivocal terms. This tips the scales of justice too much in favor of the government. This is especially true in light of *North Carolina v. Butler*.[101] In *Butler*, the Court did not require that suspects use any magic words to waive their *Miranda* rights.[102] The Court stated that a waiver of these rights could be inferred from the actions and words of the person being interrogated.[103] The Supreme Court is therefore willing to allow trained government investigators to rely on inferences, but will not allow layman suspects the

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97 Petitioner's Opening Brief at 7, Davis v. United States, 114 S. Ct. 2350 (No. 92-1949).

98 *Davis*, 114 S. Ct. at 2354. "A statement either is such an assertion of the right to counsel or it is not." *Id.* (quoting Smith v. Illinois, 469 U.S. 91, 97-98 (1984)).

99 *Davis*, 114 S. Ct at 2354.

100 *Id. See also* Tomkovicz, *supra* note 40, at 975 (fearing police will continue to badger while under guise of seeking clarification); Ada Clapp, Comment, *The Second Circuit Adopts a Clarification Approach to Ambiguous Requests for Counsel*: United States v. Gotay, 56 BROOK. L. REV. 511, 536 (1990) (clarification questioning will be used to subtly pressure suspects into withdrawing requests for counsel).

101 441 U.S. 369 (1979).

102 *Id.* at 374-76 (opining that "explicit statement of waiver is not invariably necessary to support finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case").

103 *Id.* at 373. It should logically follow that since the Supreme Court does not require the right to counsel to be explicitly waived, neither should it require it to be explicitly invoked. Clapp, *supra* note 100, at 523.

courtesy of having the police ask them to clarify their statements concerning desire for counsel.

Justice O'Connor, writing for the majority, conceded that certain suspects will be disadvantaged because of fear, intimidation and a lack of linguistic skills.[104] She recognized that these factors may prevent suspects from clearly articulating their right to counsel.[105] However, she rationalized that the mere act of informing them of their *Miranda* rights will be enough to overcome these other deficiencies and will provide enough protection against the coerced relinquishment of the right against self incrimination.[106] This simply does not correlate with the Supreme Court's holding in *Minnick*.[107] In *Minnick*, the Court stated that suspects who meet with their own attorney to discuss their predicament can later have their will overborne by the interrogation process.[108] The *Davis* Court is giving too much weight to the police reading of *Miranda* rights to potentially scared, inarticulate suspects who are totally unfamiliar with the environment in which they have been thrust. Although suspects are told they have the right to an attorney, they are never informed that they have to assert this right in clear and unequivocal terms. What message is sent to scared, young suspects who try to assert their right to counsel in the best way they can articulate when the police respond with a full steam ahead continuation of the interrogation? It is completely unlikely and unrealistic to think that these suspects will now have enough faith in the system to even attempt to

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[104] *Davis*, 114 S. Ct. at 2355 (person actually wanting attorney present may be unable to articulate such desire).

[105] *Id.* *See also* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 1, 61 (1993) (certain minority and ethnic groups tend to avoid direct assertions or confrontations and may not be able to invoke right to counsel in clear and unequivocal terms).

[106] *Davis*, 114 S. Ct. at 2355.

[107] 498 U.S. 146 (1990).

[108] *Id.* at 153. The Court held that a single consultation with counsel will not relieve suspects from persistent attempts by officials to persuade them to waive their rights or from the coercive pressures of a custodial interrogation. *Id.* The *Davis* Court therefore views the simple reading of *Miranda* rights as affording greater protection than actual consultation with counsel.

reassert or clarify their rights invocation.[109] This is why the burden should remain on the government agent to seek the clarification.

The Supreme Court has placed the investigator in an awkward position. The Court first tells investigators that if they want to engage in "sound police practice" they should utilize the clarification approach.[110] The Court then turns around and encourage investigators, who are under the gun to solve crimes, not to provide clarification but rather to just forge ahead with the interrogation.[111] This holding forces the investigator to make a quick on-the-spot decision that Monday morning quarterbacks, judges and lawyers will surely criticize. If investigators take the rope the Supreme Court has offered, they will potentially hang themselves. If investigators choose not to seek clarification, then the issue will revolve around whether the words and actions of the accused constituted an equivocal or unequivocal request. If deemed unequivocal and the investigator continues, the subsequent confession will be suppressed. Although the ambiguity or unambiguity of the statement is judged under an objective standard, various courts as well as Supreme Court Justices cannot agree on how to classify the various remarks.[112]

Regardless of the Court's opening of the door, we should continue to train our investigators to utilize the clarification approach. Although many argue that this creates too great a burden on the police,[113] this certainly

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109 *Davis*, 114 S. Ct. at 2361 (Souter, J., concurring) (suspects who view their rights invocation as being ignored may view further assertions as futile and may see confessing as only way to end interrogation).

110 *Id.* at 2356.

111 *Id.*

112 Connecticut v. Barrett, 479 U.S. 523, 536 (1987) (Stevens, J., dissenting) (finding majority to have mischaracterized counsel request); Smith v. Illinois, 469 U.S. 91, 101 (1984) (Rehnquist, J., dissenting) (disagreeing with majority that phrase "Oh yeah I'd like to do that" was an unequivocal request); United States v. McLaren, 38 M.J. 112, 115 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 1056 (1994) (Wiss, J., concurring in part and dissenting in part) (agreeing with majority that accused's statement was at *least* an equivocal request for counsel).

113 *Davis*, 114 S. Ct. at 2355-56; *see also* Minnick v. Mississippi, 498 U.S. 146, 163-67 (1990) (Scalia, J., dissenting) (rejoice at an honest confession rather than pity the person who made it).

will not cause as great an impact on police practices as the mandates of *Miranda*. Studies have shown that *Miranda* warnings have had little or no effect on police effectiveness.[114] It is a minimal burden on the investigator to clarify the ambiguous comment. The needs of both the investigator and the suspect will be met. Suspects will have the chance to better understand their rights and will be able to assert their right to counsel if they wish to do so. The investigator can clear up any ambiguities and will not have to pray that some judge examining the phrase used months after the fact will interpret its meaning and effect differently than the investigator. Additionally, with technological advancements making the presence of a camcorder commonplace in society, investigators should begin videotaping their interrogations. This will result in less litigation and reduce the number of times that law enforcement personnel have their integrity called into question. The "he said-she said" scenario would practically become extinct in relation to the interrogation process. One may argue that the presence of a camera will make suspects more apprehensive and less willing to talk. The reality is that the camera will have a minimal impact in this already pressure filled environment.

Many criticize the clarification approach because they feel that it invites police to engage in deceptive practices during the clarification period in which they will dissuade suspects from exercising their rights.[115] The same argument could be made concerning the mere reading of *Miranda* rights. There is potential that police will advise suspects of their rights in a persuasive manner in an attempt to dissuade. There is even the potential that the police will lie about the very fact of whether suspects were even informed of their rights. However, for the most part this is the exception rather than the rule. If police really were that deceptive and deceitful, there would not be the plethora of litigation concerning whether the policeman was required to inform suspects of their rights.

The greatest virtue of the *Edwards* holding was its ease of application. The bright line rule that an interrogation must cease upon request for counsel created a workable environment for police, prosecutors

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[114] See Mark Berger, *Compromise and Continuity*: Miranda *Waivers, Confession Admissibility and the Retention of Interrogation Protections*, 49 U. PITT L. REV. 1007, 1009 (1988); Stephen J. Schulhofer, Reconsidering Miranda, 54 U. CHI. L. REV. 435, 456-60 (1987).

[115] For a full discussion of potential inadequacies in the clarification approach, see Tomkavicz, *supra* note 40, at 1029-37; Clapp, *supra* note 100, at 534-39.

and the judges applying the law. The ambiguous request for counsel was not something directly addressed in the *Edwards* holding. The Supreme Court had the opportunity in *Davis* to solidify a clear course for the government to follow and remove the uncertainty faced by the various jurisdictions. The Court should have mandated the use of the clarification approach rather than just calling it sound police practice. Furthermore, the Court should have given investigators guidance as to what terminology to use in seeking the clarification. The mechanical approach of *Miranda* warnings protects an accused's rights while at the same time letting police know what they have to do to avoid suppression of essential evidence. Police would have welcomed delineated guidance concerning safe wording to use to clarify ambiguous requests; such a suggestion would have ultimately been universally adopted and implemented. Instead the Supreme Court has left us with a state of law that will lead to greater litigation and more people wondering what course of action to take.

THE RESPONSIBILITY AND AUTHORITY OF THE SECRETARY OF THE NAVY FOR THE OVERSIGHT OF INTELLIGENCE ACTIVITIES UNDER THE OPERATIONAL CONTROL OF A JOINT FORCES COMMANDER

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I. INTRODUCTION

Our government by its very nature, with our open society, the Constitution and the Bill of Rights, outlaws intelligence organizations of the kind that have developed in police states. Such organizations as Himmler's Gestapo and the Kremlin's KGB could never take root in this country.[1]

However, an amicus curiae brief filed by a group of former Army Intelligence Agents advises that Army surveillance of civilians is rooted in secret programs of long standing. "Army intelligence has been maintaining an unauthorized watch over civilian political activity for nearly 30 years."[2]

The intelligence community has, for years, operated under stringent controls imposed by congress, the executive branch, and individual agencies. These controls establish procedures for "oversight" of intelligence activities and are intended to ensure that our intelligence agencies conduct their operations within the bounds of the law and with due respect for the legitimate privacy rights of Americans. While intelligence agencies have

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1 Allen Dulles, The Craft of Intelligence, 239 (New York: The New American Library Of World Literature, 1965).

2 Laird v. Tatum, 408 U.S. 1, 27 (1972).

accepted, and even embraced[3], the concept of intelligence oversight, the authority and responsibility of the service secretaries in the performance of certain intelligence oversight functions within the Department of Defense (DOD) needs to be clarified.

This article will present an overview of congressional and executive branch oversight requirements and directives, and then focus on DOD and Department of the Navy (DON) procedures. It will consider the role of the Secretary of the Navy in intelligence oversight and the means by which the Secretary has executed his oversight responsibilities. The focus will be on the oversight provisions for intelligence activities involving DON personnel and resources under the operational control of theater commanders-in-chief or Joint Task Force commanders. The sources and effects of the ambiguity arising from inconsistent statutory, regulatory, and executive order provisions will be explained, and alternative interpretations of these directives will be considered. The possible consequences of the ambiguity will demonstrate the need for clarification of the service secretary's authority and responsibility in intelligence oversight. Finally, a solution will be proposed which is consistent with applicable laws, executive orders, regulations, and satisfies the legitimate concerns of both service secretaries and unified commanders.

II. DISCUSSION: CONGRESSIONAL OVERSIGHT

Intelligence oversight in the Department of the Navy is an activity established and governed by a series of directives issued by the President, Congress, the Department of Defense, and the Navy itself. To trace the origins of intelligence oversight as it exists today, one must begin in the 1970's. Revelations in the press, to the effect that American intelligence agencies had "spied on Americans," eventually found their way into the courts and the congress. Once armed with a ***prima facie*** claim that they had been targeted by intelligence agencies, protesters were often better equipped to assume the offensive with the aid of the courts. As an appellate court judge pointed out in one landmark case of the period:

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[3] *See generally*, Elizabeth R. Rindskopf, *Intelligence Oversight in a Democracy*, 11 Hous. J. Int'l L. 21 (1988). Ms. Rindskopf was, at the time of her article, the General Counsel of the National Security Agency. She is presently the General Counsel of the Central Intelligence Agency.

> Discovery conducted by plaintiffs in the district court revealed that among the several thousand computerized files it maintained on Americans involved in various aspects of the antiwar movement, Operation CHAOS ultimately developed files on 15 of the individual appellants and the five appellant organizations. The gravamen of plaintiffs' claims with respect to Operation CHAOS concerned the several known methods whereby the CIA compiled information on plaintiffs' activities. . . .[4]

Both houses of congress formed committees to investigate intelligence activities. These committees were chaired by Representative Otis Pike and Senator Frank Church.[5] On January 29, 1976, the "Pike Committee," as it was known, issued its final report, and on April 26, 1976, the Select Committee of the U.S. Senate to Study Governmental Operations with Respect to Intelligence Activities, (the "Church Committee") issued its own report.[6]

One of the recommendations of the Church Committee was the formation, in each house of congress, of permanent committees charged with the responsibility for intelligence oversight.[7] On May 19, 1976, the Senate Select Committee on Intelligence was formed[8] to consolidate, within the Senate, jurisdiction over intelligence matters including oversight, and to

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4 Halkin v. Helms, 690 F.2d 977, 982 (D.C. Cir. 1982).

5 United States Intelligence: An Encyclopedia, 87 (N.Y. and London: Garland Pub. Inc, 1990).

6 Foreign and Military Intelligence, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976).

7 National Security Law, 923 (John N. Moore, Frederick S. Tipson, & Robert F. Turner, eds.) (1990).

8 *See generally* Senator Barry Goldwater, *Congress and Intelligence Oversight*, 16, The Wash. Q., Summer 1983.

render congressional oversight more effective. Within the House of Representatives, a parallel committee, the House Permanent Select Committee on Intelligence, was established. Building on the efforts of these committees, congress passed the Congressional Oversight Act[9] in 1980. This statute, as amended in 1991,[10] requires the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the government which are "involved in intelligence activities," to keep the two congressional committees "fully and currently informed of all intelligence activities . . . including any anticipated intelligence activity, and any significant intelligence failure."[11] The statute also imposes upon all intelligence agencies a duty to furnish, upon request by the congressional committees, any information in the possession of the agencies, concerning intelligence activities, necessary for the congressional committees to carry out their oversight responsibilities. Finally, the statute imposes upon the President an affirmative duty to report to the committees, "in a timely fashion . . . any illegal intelligence activity . . . and any corrective action that has been taken or is planned to be taken in connection with such illegal activity,"[12] and mandates that the President and the intelligence agencies establish procedures to implement the provisions of the statute.[13]

III. EXECUTIVE BRANCH OVERSIGHT - WHITE HOUSE LEVEL

In 1985, the American Bar Association's Standing Committee on Law and National Security sponsored a report on the status of intelligence oversight.[14] The report was based upon a survey of the opinions of current

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9 Pub. L. No. 96-450, Title IV, § 407(b)(1), 94 Stat. 1981, Oct. 14, 1980; codified at 50 U.S.C. § 413, 50 U.S.C.A. § 413, 50 U.S.C.A. § 413 (West Supp. 1994).

10 10 Pub. L. No. 102-88 § 602, Title VI, 105 Stat. 441, Aug. 14, 199 [codified at 50 U.S.C. § 413(a)].

11 *Id.*

12 *Id.*

13 50 U.S.C. § 413(b), 50 U.S.C.A. § 413(b) (West Supp. 1994).

14 ABA, Standing Comm. on L. and Nat'l Sec., *Oversight and Accountability of the U.S. Intelligence Agencies: An Evaluation* (Report by the Working group on Intelligence Oversight and Accountability, 1985).

and former senior officials in congress, the executive branch, the intelligence community, and academia on intelligence oversight issues. One of the conclusions of that study was that:

> Congressional oversight is no substitute for the presence in the executive branch, and particularly within the intelligence agencies, of effective internal mechanisms of oversight and structures of review and accountability.[15]

While the congress had gone about the process of establishing a system of intelligence oversight, the executive branch had also been at work. In fact, the first requirement for congressional committees to be kept "fully and currently" informed as to ongoing or anticipated intelligence activities came ***not*** from an act of congress, but from Exec. Order No. 12036, issued by President Carter two years before the passage of the Congressional Oversight Act.[16] President Reagan's Exec. Order No. 12333,[17] issued on December 4, 1981, replaced the Carter order and remains in effect today as the most authoritative executive branch directive on intelligence oversight. Executive Order No. 12334,[18] also issued on December 4, 1981, established the President's Intelligence Oversight Board. This three person panel is composed of presidential appointees from outside the government, and advises the President of intelligence activities which any member of the Board believes are violative of the constitution or federal law. The Board is empowered to conduct such investigations as it deems necessary to its function, and to notify the Attorney General of intelligence activities the Board believes may be unlawful.

In 1993, by Executive Order No. 12,863, President Clinton revoked Executive Order No. 12,334 and expanded the size of the intelligence oversight board (IOB) to "not more than four members," all of whom would

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15 *Id.* at 95.

16 Exec. Order No. 12,036, 3 C.F.R. 112 (1978); *revoked by* Exec. Order No. 12,333, *infra* note 17.

17 Exec. Order No. 12,333, 3 C.F.R. 200 (1982); *reprinted in* 50 U.S.C. § 401 (1981).

18 Exec. Order No. 12,334, 46 Fed. Reg. 59955 (1981); *revoked by* Exec. Order No. 12,863, *infra* note 19.

also serve as members of the President's Foreign Intelligence Advisory Board (PFIAB). The focus of the IOB on matters of oversight was not changed, although the PFIAB was directed to review issues of management, personnel, and organization within the intelligence community.

Executive Order No. 12,333 mandates that heads of departments and agencies with organizations in the intelligence community "report to the Attorney General possible violations of federal criminal laws by employees," and "report to the Intelligence Oversight Board, and keep the Director of Central Intelligence appropriately informed, concerning any intelligence activities of their organization that they have reason to believe may be unlawful or contrary to Executive Order or Presidential directive." Significantly, the Executive Order defines "Intelligence Community and agencies within the Intelligence Community" to include "the intelligence elements of the Army, Navy, Air Force, and Marine Corps."[19] This definition, of course, does ***not*** include Commanders-in-Chief or the Chairman of the Joint Chiefs of Staff. The Executive Order also requires that certain officials, including the Secretary of Defense, "issue appropriate directives as are necessary to implement this Order."[20]

IV. EXECUTIVE BRANCH OVERSIGHT: DEPARTMENT OF DEFENSE LEVEL

Within DOD, the key directives governing intelligence oversight are DOD Directive 5240.1R of December 1, 1982, on the conduct of intelligence activities, and DOD Directive 5148.11 of December 1, 1982, establishing the office of the Assistant Secretary of Defense (Intelligence Oversight).

DOD Directive 5240.1R, entitled "Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons," contains several requirements for oversight at either the Department of Defense or military department level, depending upon the nature of the intelligence activity. For example, in order for employees of DOD intelligence components to participate, on behalf of the Department, in certain organizations, for the purpose of influencing the activities of the organization or its members, and to undertake such participation without

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19 Exec. Order No. 12,863, 3 C.F.R. 632 (1993); *reprinted in* 50 U.S.C. § 401 (1993).

20 Exec. Order No. 12,333, *supra* note 17 at § 3.2.

disclosing an affiliation with DOD, approval must generally be obtained from the Deputy Under Secretary of Defense (Policy), with the concurrence of the Department of Defense General Counsel.[21] On the other hand, the General Counsel of each military department is authorized to approve requests to assign DOD employees to assist federal law enforcement authorities.[22]

DOD Directive 5148.11 charges the Assistant Secretary of Defense (Intelligence Oversight)—hereinafter referred to as ATSD(IO)—with responsibility for "independent oversight of all intelligence activities of the Department of Defense." The ATSD (IO), is required to ensure that DOD intelligence activities are conducted in compliance with federal law, and other laws as appropriate; executive orders and presidential directives; and DOD policy directives. The ATSD(IO), in the execution of this function, is subject to the direction, authority, and control of the Secretary of Defense.

The ATSD(IO) is directed to review and authorize broad authority to conduct independent investigations of "all allegations raising questions of legality or propriety of intelligence activities in the Department of Defense;"[23] and to "communicate directly with the Secretaries of the Military Departments . . . and the Commanders of the Unified and Specified Commands. . . ."[24] Within this last phrase lies a source of ambiguity that contributes to uncertainty as to the precise authority and responsibility of service secretaries in certain intelligence oversight matters. The grant of authority to the ATSD(IO) to deal directly with commanders of Unified and Specified Commands on intelligence oversight issues ***could*** be construed to put those commanders on a par with service secretaries vis-a-vis the relationship of each with the ATSD(IO). This matter will be explored below in the discussion of the intelligence oversight ramifications of the 1986 DOD Reorganization Act.

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21 DOD Directive 5240.1R, Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons, Procedure 10 (Dec. 1, 1992).

22 *Id.*, Procedure 12 (Dec. 1, 1982).

23 DOD Directive 5148.11, Assistant to the Secretary of Defense (Intelligence & Oversight) (Dec. 1, 1982).

24 *Id.*

V. EXECUTIVE BRANCH OVERSIGHT: DEPARTMENT OF THE NAVY LEVEL

The responsibility of the Secretary of the Navy to oversee intelligence is based upon the Secretary's statutory duties.[25] The Secretary of the Navy is responsible, "subject to the authority, direction, and control of the Secretary of Defense," for the "effective supervision and control of the intelligence activities of the Department of the Navy."[26]

Intelligence oversight within the Department of the Navy was, until recently, performed at the Departmental level by two boards: the Navy Intelligence Oversight Review Board (NIORB) and the Sensitive Activities Review Board (SARB). These Boards have recently been abolished and their duties subsumed by the newly created Senior Review Board.

In 1988, the Secretary of the Navy issued an instruction addressing "Oversight of Intelligence Activities Within the Department of the Navy."[27] This instruction was obviously intended to clarify the role of the Secretary of the Navy in intelligence oversight matters, since the "purpose" paragraph of the instruction states that it was issued, "To ***confirm*** the authority and responsibility of the Secretary of the Navy for oversight of Navy and Marine Corps intelligence activities . . ."[28] (emphasis added). The Instruction mandated that the NIORB[29] would serve in an advisory capacity to the Under Secretary of the Navy, with a requirement to review all DON "intelligence activities, programs, and plans for possible illegalities or

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25 10 U.S.C. § 5013(c)(7) [Added Pub. L. No. 99-433, Title V, § 511(c)(2) (1986), 100 Stat. 1043, and amended Pub. L. No. 99-661, Div. A, Title V, § 534 (1986), 100 Stat. 3873, 10 U.S.C. § 5013(c)(7) (West Supp. 1994)].

26 *Id.*

27 SECNAVINST 3820.3D, Oversight of Intelligence Activities within the Department of the Navy (Aug. 26, 1988).

28 *Id.*

29 The composition of this Board, as established by the Instruction, included the Naval Inspector General as Chairman, the Navy General Counsel, and the Judge Advocate General of the Navy. When the Board considered Marine Corps matters, its membership expanded to include the Deputy Naval Inspector General for Marine Corps Matters, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Counsel to the Commandant of the Marine Corps.

improprieties under standards established by statute, this instruction, or other applicable directives." The Instruction provided for only one exception to the general requirement for the exercise of oversight by the NIORB:

> In those instances where [Department of the Navy] intelligence components support National Security Agency (NSA) activities, those activities need not be reported under the provisions of this subparagraph when they are subject to the current intelligence oversight activities of NSA.[30]

The Sensitive Activities Review Board (SARB), established in 1990,[31] was chartered to monitor activities which—while not necessarily violative of law or regulation—had the potential to embarrass the Department of the Navy[32] or endanger personnel or property. These activities included support for counter-terrorist training and support to law enforcement agencies, including counter-narcotics support. The SARB was also specifically required to examine activities which raised issues of "propriety." The SARB was required to meet at least quarterly, and to advise the Under Secretary of the Navy of any sensitive activity which, in the opinion of the SARB, was violative of laws, directives, or policies. Moreover, the directive mandated that:

> Navy components shall report all requests for the conduct or support of significant sensitive activities via their chain of command to CNO. Marine Corps

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30 SECNAVINST 3820.3D, *supra* note 27.

31 The Directive which created the Board is SECNAVINST 5000.34A, Oversight of Sensitive Activities within the Department of the Navy (Feb. 21, 1990). The composition of the Board differed slightly from that of the NIORB. On the SARB, the Naval Inspector General was the Chair, and "principal members" were the Deputy Naval Inspector General for Marine Corps Matters, the Judge Advocate General of the Navy, and the Navy General Counsel. When Marine Corps matters were under review, the Staff Judge Advocate to the Commandant and the Counsel to the Commandant participated as members.

32 The directive states, in this regard, that "Sensitive Activities by their nature can be subject to abuse, illegality, or overzealous execution, and they have important political and public relations ramifications."

> components shall report to CMC. . . . Requests for support of sensitive activities must be reported ***even when they are made by other departments or agencies, including other military departments.*** (Emphasis added).[33]

In the NIORB and the SARB, the Department of the Navy had created bodies with specialized knowledge and expertise in matters of intelligence oversight, and had empowered those bodies with the authority required to make them effective organs for the performance of the oversight function. Moreover, the Secretary of the Navy had made clear to component commanders that a failure to report a matter within the cognizance of these Boards would not be excused based upon a claim that the matter was under the control of an officer who was not subordinate to the Secretary of the Navy.

In January, 1993, the Secretary of the Navy directed that the functions of the NIORB and the SARB be consolidated under the cognizance of the newly created Senior Review Board (SRB),[34] which was given the additional responsibility of oversight for special access programs administered within the Department of the Navy. The SRB serves today as the administrative organ for DON intelligence oversight.

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[33] SECNAVINST 5000.34A, *supra* note 31.

[34] This Board was created by a Secretary of the Navy Memorandum dated Jan. 15, 1993, the subject of which is "Oversight of Compartmented Activities in the Department of the Navy." The composition of the SRB differs from that of the NIORB and the SARB. The SRB is composed of the Under Secretary of the Navy, (Chair), the Vice Chief of Naval Operations, the Assistant Commandant of the Marine Corps, the Assistant Secretary of the Navy, (Research Development & Acquisition), the Assistant Secretary of the Navy, (Financial Management), the General Counsel of the Navy, and the Deputy Chief of Naval Operations (Resources, Warfare Requirements & Assessments. Members of the now defunct NIORB and SARB who are ***not*** full members of the SRB will, nonetheless, participate in meetings of the SRB when matters previously under the cognizance of the NIORB and SARB are discussed.

VI. THE RELATIVE RESPONSIBILITIES OF THE SECRETARY OF DEFENSE AND THE SERVICE SECRETARIES

Intelligence oversight is, of course, only one of the many functions of the Department of Defense. A discussion of the relationship between the Secretary of Defense and the service secretaries in intelligence oversight must begin with a consideration of the fundamental legal relationship between the Department of Defense and the military departments. Two provisions of federal law, intended to be read as consistent, address the relative responsibility and authority of the Secretary of Defense and the secretaries of the military departments. In the first statute[35] congress declares its intent " . . . to provide that each military department shall be separately organized under its own Secretary and shall function under the direction authority and control of the Secretary of Defense . . . ***but not to merge these departments or services***."[36] (Emphasis added). In the second statute, congress provided that:

> Subject to [the first statute], the Secretary of Defense shall take appropriate action, (including the transfer, reassignment, consolidation, or abolition of any function, power, or duty) to provide more effective, efficient, or economical administration and operation, or eliminate duplication in the Department of Defense. However, except as provided [elsewhere in this statute], ***a function, power, or duty vested in*** the Department of Defense, or ***an officer, official, or agency thereof, by law may not be substantially transferred, reassigned, consolidated or abolished***. (Emphasis added).[37]

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35 Pub. L. No. 85-599, § 2, 72 Stat. 514, codified at 50 U.S.C.A. § 401, 50 U.S.C.A. § 401 (West Supp. 1994).

36 *Id.*

37 As amended, Pub. L. No. 98-525, Title XIV, § 1405(i) (1984), 98 Stat. 2621; Pub. L. No. 99-433, Title I, Section 103, Title III, Section 301(b)(1), Title V, Section 514(c)(1) (1986), 100 Stat. 996, 1022, 1055; Pub. L. No. 100-510, Div A, Title XIII, Section 1301(3) (1990), 104 stat. 1668, codified at 10 U.S.C. § 125(a).

There are only two circumstances under which the statute permits the transfer, reassignment, consolidation, or abolition of a Departmental function: the first applies in situations involving actual or imminent hostilities and the second concerns only issues involving weapons systems.

VII. THE EFFECT OF THE DEPARTMENT OF DEFENSE REORGANIZATION ACT

In 1986, congress passed the DOD Reorganization Act, popularly known as "Goldwater-Nichols."[38] The intent of this legislation was to increase the authority of the "warfighting" commanders responsible for joint service operations.[39] The legislation had the effect of increasing the independence of those commanders vis-a-vis individual service chiefs and service secretaries, and "streamlining" the control by the Joint Chiefs of Staff and the DOD over "joint" operational matters. For example, in specifying the command-support relationship of a service secretary to the commander of a combatant command, the law now provides that:

> Subject to the authority, direction, and control of the Secretary of Defense ***and subject to the authority of the commanders of the combatant commands under section 164(c) of this title*** [10 U.S.C. § 164(c)] the Secretary of a military department is responsible for the ***administration and support*** of forces assigned by him to a combatant command. [Emphasis added.][40]

While the effect of Goldwater-Nichols on "operational" issues is clear, the applicability of the statute to intelligence oversight issues is ambiguous. For example, even after Goldwater-Nichols, the Secretary of the

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38 Pub. L. No. 99-433, Title II, § 214(b) (1986), 100 Stat. 1013, and amended Pub. L. No. 100-456, Div. A, Title V, § 519(a)(2) (1988), 102 Stat. 1972 (codified generally in 10 U.S.C.).

39 10 U.S.C.A. § 164 (West Supp. 1994).

40 Pub. L. No. 99-433, Title II, § 211(a) (1986), 100 Stat. 1016, codified at 10 U.S.C. § 165(b).

Navy has authority over intelligence oversight for intelligence activities of the Department of the Navy.[41] However, the scope of this authority, in situations in which Navy personnel and units are operationally controlled by "joint" commanders, is not clarified in the statute. Joint commanders could take the position that the collection of intelligence in support of their operational requirements renders such collection—even if performed by Navy personnel or platforms—exempt from oversight by a service secretary. The Secretary of the Navy, on the other hand, could argue that Goldwater-Nichols was not intended to reduce the role of service secretaries in intelligence oversight, and that, moreover, the statute must be read consistently with the Congressional Oversight Act, Exec. Order No. 12333, and DOD regulations. These competing arguments will now be discussed in greater detail.

VIII. THE CASE FOR CONTINUED SECRETARIAL OVERSIGHT

When congress enacted Goldwater-Nichols, congress ***could*** have modified the requirements of the Congressional Oversight Act[42] to reduce the reporting requirements imposed on service secretaries in matters of intelligence oversight. Congress did not, however, modify the requirement that the Secretary of the Navy (as the "head" of an agency of the government involved in intelligence activity) keep congress "fully and currently informed of ***all*** intelligence activities . . . including ***any*** anticipated intelligence activity." (Emphasis added). The fact that congress did not modify this requirement is a strong indication of congressional intent that the role of service secretaries in intelligence oversight has ***not*** been diminished by Goldwater-Nichols.

Therefore, absent a specific restriction by the Secretary of Defense on the intelligence oversight role of a service secretary, (the imposition of which may, itself, be violative of either the Congressional Oversight Act,[43] or Title 10 U.S.C. § 125,[44] or both), departmental oversight is consistent with the statutory responsibility of the Secretary of the Navy. This is true

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41 10 U.S.C. § 5013, *supra* note 25.

42 50 U.S.C. § 413a, *supra* note 10.

43 *Id.*

44 Pub. L. No. 98-595, Title XIV § 1405(i) (1984), *supra* note 36.

notwithstanding the fact that a "joint" commander may have exercised ***operational control*** over the intelligence activity which is the subject of secretarial oversight. The relevant statute provides that:

> ***Subject to the authority, direction, and control of the Secretary of Defense***, the Secretary of the Navy is also responsible to the Secretary of Defense (SECDEF) for . . . the effective supervision and control of the intelligence activities of the Department of the Navy. (Emphasis added).[45]

This language does ***not*** relieve the Secretary of the Navy of intelligence oversight obligations, or the requirement to inform congress of intelligence activities. Its effect is simply to clarify the long recognized subordination of military departments to the Department of Defense.

Finally, pragmatic considerations weigh in favor of continued secretarial involvement in the oversight of intelligence activities. First, as a matter of public policy, "oversight" should entail review by an authority detached from concerns arising from operational expediency, and should therefore be undertaken by an authority ***other than*** a commander in the operational chain. Second, should an incident occur which raises the specter of a "failure of intelligence oversight," the military department involved could reasonably be expected to become the focus of media and congressional inquiry. For a service secretary to explain a departmental failure to oversee and report the activity on the basis that the activity was directed by a "joint" commander may be perceived as a lame excuse for unsatisfactory performance at the departmental level. For too many people, the issue of responsibility will be determined by the question "What color uniform was worn by those involved in the incident?" If the answer to that question is "navy blue," explanations based upon the effects of "jointness" will fall on deaf ears.

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[45] 10 U.S.C. § 5013(c)(7), *supra* note 25. Similar language is provided for the secretaries of the other military departments. The language governing the Department of the Army is found at 10 U.S.C. § 3013(c)(7), and the language pertaining to the Department of the Air Force is at 10 U.S.C. § 8013(c)(7).

IX. THE CASE FOR A DIMINISHED DEPARTMENTAL ROLE IN OVERSIGHT

The collection of intelligence, and the conduct of intelligence activity, should be considered an operational matter entrusted, under Goldwater-Nichols, to operational commanders and intended to be immune from departmental control. Requiring operational commanders to report prospective intelligence activities to departmental secretaries would constitute a grant of ***de-facto*** veto authority in ***each one*** of the service secretaries, and raises the possibility that the secretaries would reach inconsistent conclusions on activities drawing upon the resources of more than one service. This, in turn, could impede action on "time sensitive" activities urgently needed to support military operations, including combatant operations.

Not only is the Secretary of Defense ***authorized*** to effect a realignment and consolidation of intelligence oversight procedures, but arguably, he has been remiss in not ***already*** complying with the clear intention of congress that functions such as oversight—in this context—be consolidated and centralized. A consolidation of oversight at the DOD level for intelligence operations directed by joint commanders would promote more efficient and economical conduct of the oversight, insure uniformity of interpretation, and avoid duplication of effort: the ***precise goals*** that congress announced when it enacted 10 U.S.C. § 164.[46]

X. THE ATTEMPT TO RESOLVE THE AMBIGUITY

In a September 1990 message to the Chairman of the Joint Chiefs of Staff, the Commander-in-Chief, Southern Command (USCINCSO), requested clarification of approval and coordination requirements for the provision of operational support to law enforcement activities engaged in counter-narcotics activities.[47] USCINCSO advised that, in lieu of coordinating plans for providing such support with "DOD ***component*** General Counsel," (emphasis added), Southern Command would "act on the assumption that, as a unified command, USSOUTHCOM must effect

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[46] 10 U.S.C. § 164, *supra* note 37.

[47] USCINCSO message DTG R 052015Z Sept. 90, To: Joint Staff, Wash. D.C. (J-3), Subj: Delegation of Authority for Approving Operational Support to Drug Law Enforcement Agencies.

coordination with ***DOD*** General Counsel's office."[48] (Emphasis added). At issue was the requirement of Exec. Order No. 12333, implemented within the Department of Defense by DODINST 5240.1R, Procedure 12, that agencies within the intelligence community, before providing expert personnel to support local law enforcement agencies, obtain approval "in each case by the General Counsel of the providing agency."[49]

In endorsing USCINCSO's proposal, the Office of the Joint Chiefs of Staff made the following points:

> [It is] not appropriate for service General Counsel to have approval authority over CINC's operations. [This would be] contrary to intent of Goldwater-Nichols DOD Reorganization Act of 1986. Executive Order 12333, written in 1981, did not envision the current relationship between CINC's and the SECDEF established by Goldwater-Nichols.
>
> If forces from multiple services are used, requiring approval from several General Counsel, the result could be conflicting responses.
>
> Intelligence personnel assigned to a CINC who are designated to provide Law Enforcement Agency support are "provided by" the CINC, and not a military department. While a CINC is not an "agency" and has no General Counsel within the meaning of the Executive Order, DOD is an agency, and has a General Counsel.
>
> DOD General Counsel could provide intelligence oversight for intelligence forces assigned "in support of" CINC's.

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48 *Id.*

49 Exec. Order No. 12333, *supra* note 17.

> Goldwater-Nichols assigns responsibility to oversee intelligence activities of departments to respective service secretaries, subject to the authority direction and control of SECDEF. SECDEF may therefore exercise supervisory authority and provide intelligence oversight of assets assigned a mission by a CINC, and remain consistent with Executive Order 12333.[50]

Mr. Albert Dyson, a Senior attorney in the DOD Office of General Counsel tasked to review the USCINCSO proposal and the comments of service secretaries,[51] concluded that while the USCINCSO proposal was legally defensible, "We cannot dismiss the concerns of the military departments nor minimize their importance in this debate to date . . . there may be policy considerations, concerning possibly the sensitivities of congress, which may have an impact on this issue."[52]

Among the comments that Mr. Dyson considered were those of Mr. Dan Howard, Under Secretary of the Navy. Mr. Howard conceded that it would be within the authority of the Secretary of Defense to relieve departmental secretaries of certain intelligence oversight responsibility, and to consolidate such oversight at the Department of Defense level. "However," Mr. Howard pointed out, "we believe the Secretary is well served by the civilian Military Department oversight of the intelligence

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50 DOD Office of General Counsel memo from Albert H. Dyson, III, Senior Attorney, Office of the Assistant General Counsel (International & Intelligence) of Dec. 4, 1990, subj.: SOUTHCOM Delegation of Authority Request; synopsizing the points made by the Office of the Joint Chiefs of Staff, reviewing legal and policy issues, and recommending response by the General Counsel, Department of Defense.

51 All three military departments, in memoranda to the Assistant Secretary of Defense, Drug Enforcement Policy, opposed the USCINCSO proposal. The Department of the Navy position is set forth in a memorandum dated Nov. 1, 1990, signed by Dan Howard, Under Secretary of the Navy. The Department of the Army's position is recorded in a memorandum dated Oct. 31, 1990, signed by Susan Livingstone, Assistant Secretary of the Army (Installations, Logistics, & Environment). The Department of the Air Force's position is explained in a memorandum dated Oct. 26, 1990, signed by Michael P. Reardon, Deputy Assistant Secretary of the Air Force, (Reserve Affairs).

52 Albert H. Dyson III, *supra* note 46.

activities contemplated by the statutory and regulatory scheme, and that such oversight is particularly important to counter-narcotics efforts."[53]

XI. THE CURRENT SITUATION

The 1990 effort by USCINCSO to "streamline" intelligence oversight failed, in the face of strong opposition by all three departmental service secretaries. The issue, however, arose again last year, in the absence of a confirmed service secretary in any of the military departments. Resurrection of the issue was triggered by a message from the Joint Chiefs of Staff, sent in May 1993, to Commanders-in-Chief.[54] This message sought from field commanders a "description of any instances wherein current arrangement[s] for civilian supervision and control resulted in a failure to accomplish a mission, was unable to resolve a difference between your command and the military department concerned, or otherwise proved unsatisfactory."

The response sent by USCINCSO[55] to this message is classified SECRET, but contains the following UNCLASSIFIED concluding paragraph:

> While this command completely supports the concept of civilian oversight of intelligence activities, the convoluted procedures unified commanders now confront, potentially involving several services' general counsels, unnecessarily complicate the approval process. Additionally, this procedure essentially gives each service general counsel veto power over unified command intelligence operations. This appears inconsistent with

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53 Office of the Secretary of the Navy Memo of Nov. 1, 1990, A Memorandum for the Deputy Assistant of Defense, Drug Enforcement Policy, Subj: USCINCSOUTH Delegation of Authority Inquiry: Intelligence Oversight Responsibility.

54 CJCS message DTG 101333Z May 93, To: In addition to all CINCs, this msg was sent for information to Director of Naval Intelligence and the Secretary of Defense, Subj: Supervision and Control of Intelligence Activities.

55 USCINCSO message DTG P 161845Z Jun. 93, To: CJCS, Wash. D.C., Subj: Supervision and Control of Intelligence Activities.

> the provisions of the Goldwater-Nichols legislation. Limiting legal oversight authority to the OSD General Counsel will alleviate both of these concerns.

The concerns expressed by USCINCSO, however, were not echoed by other commanders-in-chief. The Commander-in-Chief Pacific, responding to the same request for information that prompted USCINSO's complaints, reported that:

> USCINCPAC has no instances where civilian supervision and control have resulted in failure to accomplish a mission or where USCINCPAC was unable to resolve any differences. . . . [56]

The response from the commander-in-chief of our forces in Europe was even stronger:

> While we have experienced minor problems with in-theater stovepipes, we have adopted suitable workarounds. We don't believe a change from service control to OSD is appropriate, and in fact, could make the situation worse. We cannot cite any specific instances where service control of intelligence oversight has impacted on missions or otherwise proved unsatisfactory.[57]

The fact that there is no perception of a problem—except by USCINCSO—in the conduct of intelligence oversight by service secretaries does not necessarily invalidate that commander's conclusions. It may be that the specialized missions in his theater, especially those involving counter-narcotics and support to civilian law enforcement, are affected by the oversight process differently, or to a greater degree, than those of other

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[56] USCINCPAC message DTG R 212330Z Jun. 93, To: CJCS, Wash. D.C., Subj: Supervision and Control of Intelligence Activities.

[57] USCINCEUR message DTG P 021300Z Jul. 93, To: Joint Staff, Wash. D.C., Subj: Supervision and Control of Intelligence Activities.

commanders-in-chief. However, the question of ***why*** the perception of a problem appears to exist only within the jurisdictional area of ***one*** commander-in-chief deserves to be clarified.

In late 1993, a formal proposal from the Joint Staff to effect a consolidation of intelligence oversight for "joint" matters at the DOD level was in circulation. The issue remains unresolved.

XII. CONCLUSION

USCINCSO's basic complaint is that the oversight system is "convoluted." If this is correct, the system must be remedied. Commanders-in-chief are entitled to demand from policy makers understandable systems designed to meet their operational needs. We cannot afford to impose on operational commanders a series of ambiguous, convoluted, or confusing procedures intended to finesse a way around the difficult fact that departmental service secretaries have less power and influence than they did in the 1960's. Service secretaries retain an important role in the military chain of command, and it is in the interest of both service secretaries and operational commanders that command relationships be clearly drawn and thoroughly understood.

Whether one approaches defense policy issues as an advocate for departmental prerogatives or for consolidation, centralization, and enhanced authority for "warfighting" commanders, one must accept the fact that the trend has been toward the latter. The trend is likely to continue, especially as the resources of the Department of Defense are reduced. This, common sense dictates, is the context in which a proposal to consolidate intelligence oversight procedures will be considered. It is a context that will probably lend sufficient weight to the complaints of USCINCSO to overcome some legitimate objections to the validity of the complaints.

Since inconsistencies in statutes, executive orders and regulations make it possible for both the CINC's and the service secretaries to support their positions, two alternative means to resolve the difference of opinion exist. Either the directives which give rise to varying interpretations should be revised, or a decision should be made by an official with sufficient authority to resolve the ambiguity. Because the first alternative would involve legislative action as well as revision of executive orders, it should be pursued ***only*** if the second alternative cannot be implemented within the Department of Defense.

The concerns of the service secretaries do not appear founded upon mere parochial "turf" concerns, but upon their perception of their responsibilities as "agency heads" under the statute, executive orders, and regulations discussed above. However, were the service secretaries to be properly relieved of these responsibilities, it would appear that their legitimate reservations about a proposal to concomitantly remove a portion of their authority over intelligence oversight would evaporate.

XIII. RECOMMENDATIONS

A. There is insufficient justification to support a change in the role of service secretaries in intelligence oversight without a thorough consideration of the issue, and informed discussion thereof, by civilian service secretaries in the military departments.

B. Considerations including the promotion of efficiency, unity of command, and clarity of policy dictate that, as part of a deliberate process for an overall restructuring of responsibilities for intelligence oversight in the Department of Defense, the Secretary of Defense should consolidate, at the DOD level, the oversight of intelligence activities planned by, or under the operational control of, joint forces commanders.

C. The Judge Advocate General of the Navy and the Navy General Counsel should brief the Secretary of the Navy on this issue and explain the options available. They should impress upon the Secretary the benefits to be derived from clarity in the lines of authority and responsibility for intelligence oversight, and recommend that the Secretary of the Navy participate in the process of clarifying his own responsibilities as discussed below.

D. Since the Secretary of Defense is expressly authorized to direct and control the execution of intelligence oversight by a service secretary;[58] it is within the authority of the Secretary of Defense to consolidate—at the DOD level—the responsibility for oversight as proposed. However, in order to effect this consolidation in a manner best calculated to assuage the concerns of service secretaries, and to best meet the goal of genuine clarification of responsibilities, the Secretary of Defense should expressly and explicitly—through a revision of DOD Directive 5240.1R—relieve service secretaries of oversight responsibility for

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[58] 10 U.S.C. § 5013(c)(7), *supra* note 25.

intelligence activities planned by, or under the operational control of, joint commanders.

E. The Secretary of Defense should seek a revision, or an authoritative interpretation, of Exec. Order No. 12333 to the same effect.

F. To provide for the possibility that members of congress might object to centralization, the Secretary of Defense should advise the intelligence and armed services committees in the Senate and the House of Representatives of his planned consolidation, and the reasons therefore. This will ensure that congress, when seeking information on the intelligence activities of the Department of Defense, will understand the departmental division of authority and responsibility.

DIRECT TRAINING AND MILITARY-TO-MILITARY CONTACT PROGRAMS: THE CINCS' PEACETIME ENABLERS

Captain Robert J. Kasper, Jr., JAGC, USNR *

I. INTRODUCTION

Unified Commanders[1] have historically viewed "security assistance"[2] and military-to-military contact programs[3] as a key pillar in the implementation of their regional peacetime strategies. These programs are powerful and cost-effective tools for shaping the strategic environment in their region. Both programs allow the CINCs to remain engaged with foreign military leaders and to expand their forces forward in an era of declining resources.[4]

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Captain Kasper was recalled to active duty to implement the Expanded International Military and Educational Training (E-IMET) program at the Naval Justice School in February 1992. Recently, he was selected to serve as Commanding Officer of the Naval Justice School's Reserve Unit.

1 Unified Commander will be used interchangeably with Commander-in-Chief (CINC) to denote the Commanders of the 5 unified commands, each with geographic areas of responsibility: European Command; Pacific Command; Southern Command; Central Command; and Atlantic Command.

2 Security assistance in an "'umbrella' term encompassing various military and economic assistance programs for allied and friendly foreign countries conducted by the United States." THE MANAGEMENT OF SECURITY ASSISTANCE: THE DEFENSE INSTITUTE OF SECURITY ASSISTANCE MANAGEMENT 5 (L.J. Samelson 14th ed. 1994) [hereinafter MSA].

3 In accordance with the Clinton administration's proposal, the Departments of State and Defense have recast "security assistance" under the rubric of programs for "promoting peace" and "building democracy." The Peace, Prosperity, and Democracy Act of 1994, H.R. 3765, 103d Cong., 2d Sess. (1994).

4 Larson, *IMET: A Cornerstone of Cooperative Engagement*, 15 DISAM J., Summer 1993 at 96.

Since the 1960's, American training of and assistance to foreign militaries has been an extremely useful, if not critical, instrument of our national security policy.[5] The intent of U.S. training and military assistance is to advance American foreign policy objectives by providing political leverage in recipient nations, encouraging organizational and behavioral changes in host country militaries and promoting the development of democratic institutions. This assistance is also perceived to be a cost-effective means of achieving these goals, since it does not involve the commitment of large U.S. military forces or require the maintenance of overseas installations.

Security assistance programs, in the past, have largely been used to assist foreign governments in purchasing U.S. weapon systems and in providing technical training in the use and maintenance of those weapon systems.[6] Out of the approximately $7.5 billion in security assistance appropriated to 116 countries in fiscal year 1993, only $42.5 million was provided under the auspices of the International Military Education and Training program (IMET).[7] In addition, military training provided under the IMET program has not been closely coordinated with similar training

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[5] MSA, *supra* note 2, at 15-31. The Security Assistance Program's purpose was to provide military and economic assistance to nations friendly to U.S. interests. *See Commitment to Freedom: Security Assistance as a U.S. Policy Instrument in the Third World,* A Report for the Commission on Integrated Long-Term Strategy (unpub.) (Apr. 10, 1988) (available with the Author).

[6] U.S. General Accounting Office, *Security Assistance Observations on Post-Cold War Program Changes,* 16-17 (NSIAD-92-248)(Sept. 1992) [hereinafter GAO].

[7] *Id.* at 17. The International Military and Educational Training (IMET) and the Expanded International Military Educational Training (E-IMET) programs are codified in Title 22 U.S.C. and are referred to as the "Title 22" programs. 22 U.S.C. §§ 2151 et seq (1988). In the past, more than 80% of the entire security assistance program, which included the Foreign Military Financing Program, the Foreign Military Sales (FMS) Program, the IMET Program, and the Economic Support Fund, has been spent on six countries—Egypt, Israel, Greece, Turkey, the Philippines and Portugal. For example, in Fiscal Year 1993 these six countries received $6.2 billion (including $358.2 million of concessional loans) or 83%, of the total $7.5 billion in Security Assistance funding. GAO at 16-17. These figures do not include direct military sales to Saudi Arabia, Kuwait, and other FMS customers. Recently added to this list of major recipients are the former communist bloc and Soviet republics.

sponsored by the CINCs who control initiative funds[8] and various programs sponsored under the military-to-military contacts program.[9]

Recently, the Clinton administration has proposed an overhaul of the foreign assistance programs to redirect this foreign aid to foster such broad policy objectives as promoting peace, building democracy, encouraging free trade and combating terrorism and nuclear proliferation rather than to promote weapons sales and technical training.[10] One proposal contemplated by the Clinton Administration was the creation within the Department of Defense's office of the undersecretary of policy a new post: Assistant Secretary of Defense for Democracy and Human Rights.[11] The administration's nomination for that position was eventually withdrawn and the creation of the Assistant Secretariat position abandoned.[12]

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[8] 10 U.S.C. § 166a (1988). This program supports a host of military-to-military contact programs, but has recently been focused on promoting democracy and improved observance of human rights. The Department of Defense's budget request for Fiscal Year 1995 includes $46.3 million for support of this program, which represents a 460% increase over the $10 million authorized and appropriated in Fiscal Year 1994. *See* Dep't of Defense, *Military-to-Military Contacts and Comparable Activities* (draft) (Jan. 27, 1994) (available with the author).

[9] An example of the military-to-military contacts program is the "Nunn-Lugar" program set forth in the Defense Appropriations Act of 1993, Pub. L. No. 102-396, 106 Stat. 1876. The Act provides $15 million for military-to-military contacts with the newly independent nations of the former Soviet Union.

[10] *See generally* Warren Christopher, *A Foreign Affairs Budget That Promotes U.S. Interests*, 16 DISAM J., Spring 1994 at 48.

[11] Michael R. Gordon, *Aspin Overhauls Pentagon to Bolster Policy Role*, N.Y. Times, Jan. 28, 1993, at 17; John M. Goshko & Thomas W. Lippman, *Foreign Aid Shift Sought By Clinton*, Wash. Post, Nov. 27, 1993, at 1. *See* The Foreign Assistance Act of 1961, Pub. L. No. 87-195, §§ 501-577, 75 Stat. 424, 424-42 (codified as amended 22 U.S.C. §§ 2301 to 2349aa-9 (1988))[hereinafter FAA]. Note, aid for Egypt and Israel (which absorbed 67.5% of the allocated Fiscal Year 1993 security assistance dollars) would be protected and plans to finance Russia's move toward a free market economy would be preserved. GAO, *supra* note 6, at 17-18 (an unnamed State Department official speculated that if a Middle East peace is negotiated, the level of aid provided to Egypt and Israel will be more difficult to justify).

[12] Jim Wolf, *Law Group Urges Probe of Pentagon Nominee*, Reuters News Service, Dec. 29, 1993; Jim Abrams, *US-Nomination Limbo*, The Associated Press, Nov. 27, 1993.

There appears to be agreement both in the White House and on Capitol Hill that the time for restructuring the foreign aid program has come.[13] There is no consensus, as of yet, what direction the restructuring should take. In the current international environment—in which rapid changes are resulting in dramatic reappraisals of security assistance priorities and military expenditures and force structure—U.S. contact with and training of international military students should rightly assume new importance as a relatively inexpensive, yet potentially crucial means of future national interest projection. The role of the U.S. military, however, in training students in human rights, civil-military relations, and effective judicial systems does not, at first blush, appear to conform to the traditional purpose and orientation of military training. If such training is to be an effective instrument of American influence and leverage, the Department of Defense (DOD) needs to be able to assure both the President and Congress that the programs being offered meet both the needs of the international students and the goals and objectives of the United States.

The current National Military Strategy specifically mentions IMET and military-to-military contact programs as essential components of the U.S. military policy of engagement. As increased emphasis is placed on human rights type training and familiarization programs--known as "soft" training--the need to coordinate carefully their implementation and to monitor closely their results becomes imperative. In order to be an effective peacetime enabler for the CINCs, all assistance of this type must be coordinated by the CINC's staff and the U.S. Embassy in the host country, and centrally monitored, within the DOD, by the Defense Security Assistance Agency (DSAA). The primary goal should be to eliminate duplication of military contact, education, and training efforts and to ensure that the composite DOD program provided to each country is both appropriate and carefully planned and evaluated. Each CINC needs 1) to develop a mechanism to track whether the operational goals and objectives for each country are being met; 2) to provide measures to judge the effectiveness of the training; and 3) to ensure all training and educational programs provided are carefully coordinated within his area of responsibility with the Department of State's in-country teams and the DOD's DSAA, joint staff, and CINCs.

[13] Goshko & Lippman, *supra* note 12, at 6.

II. PRESENT PROGRAMS

A. IMET and E-IMET

The International Military Education Training (IMET) portion of security assistance is a grant program that allows military personnel from allied and friendly foreign nations to attend military schools in the United States and for U.S. forces to provide training at overseas sites with mobile education and training teams.[14] Since 1950, the IMET program and its predecessor programs have trained over 500,000 foreign officers and enlisted personnel in areas ranging from professional military education to basic technical skills.[15]

In fiscal year 1991, the scope and purposes of the IMET Program were expanded to include funding for training civilian officials who work with foreign defense establishments and to earmark not less than $1 million of appropriated funds to provide training in: (1) defense resource management; (2) basic democratic principals including civilian control of the military; and (3) military justice systems and human rights.[16] In Fiscal Year 1993,

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[14] 22 U.S.C. §§ 2347-2347d (1988). The IMET program was established to facilitate relationships between the U.S. military and foreign military leaders by providing professional education and training to selected foreign officers. In Fiscal Year 1993, 122 countries received IMET funding totalling $42.5 million. Louis J. Samelson, *New Security Assistance Legislation for Fiscal Year 1993*, 15 DISAM J., Winter 1992-93 at 1, 3. Because of changes in the focus of the IMET program, countries such as Cambodia, Belarus, Bulgaria, Poland, Czech and Slovak Federal Republic, Estonia, Latvia, Lithuania, Hungary, Turkmenistan, and Albania have been included in the program to facilitate U.S. support for democracy and the rule of law.

[15] Spiro C. Manolas & Louis J. Samelson, *The United States International Military Education and Training (IMET) Program*, 12 DISAM J., Spring 1990 at 1 (discussing the value of IMET as a means of advancing U.S. interests and promoting human rights in a cost effective manner). Historically, these programs have emphasized technical over professional education. *Id.*

[16] The Foreign Appropriations, Export Financing, and Related Programs Appropriations Act of 1991, Pub. L. No. 101-513, 104 Stat. 1979, 1997. The Act provides that IMET funds be set aside for:

> . . . [D]eveloping, initiating, conducting and evaluating courses and other programs for training foreign civilian and military officials in managing and administering foreign military establishments and budgets, and for training foreign military and civilian officials in creating and maintaining

Congress opened the program for participation to national legislators who are responsible for the oversight and the management of the military.[17]

The Defense Security Assistance Agency (DSAA) has the overall responsibility within DOD for implementing the security assistance program.[18] In an effort to meet the new congressional objectives, DSAA tasked the Naval Postgraduate School, Monterey in California, to determine which courses, if any, already available at DOD training facilities could be considered as meeting the E-IMET criteria.[19] The Defense Security Assistance Agency selected the Defense Resource Management Institute (DRMI) in Monterey, California, to develop and administer a mobile education team for the resource management aspects of the program. The Naval Justice School (NJS) in Newport, Rhode Island, was chosen as " the [DOD] agency to develop a course on military justice systems, respect for civilian control of the military, and techniques to implement systems which contribute to respect for internationally recognized human rights, as well as course modules on this subject for inclusion in other Expanded IMET course

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> effective military judicial systems and military codes of conduct, including observance of internationally recognized human rights . . . [civilian personnel] shall include foreign government personnel of ministries other than ministries of defense if the military education and training would (i) contribute to responsible defense resource management, (ii) foster greater respect for and understanding of the principle of civilian control of the military, or (iii) improve military justice systems and procedures in accordance with internationally recognized human rights.

Id. at 1997.

[17] The Foreign Operations, Export Financing, and Related Programs Appropriation Act of 1993, Pub. L. No. 102-391, 106 Stat. 1633.

[18] DEP'T OF DEFENSE, THE SECURITY ASSISTANCE MANAGEMENT MANUAL, para. 30,001A (DOD Manual 5105.38.M) (Oct. 1, 1988) [hereinafter SAMM].

[19] Dep't of Defense, Defense Security Assistance Agency, *Report to the United States Congress on Development of the Expanded IMET Initiative* (Jul. 15, 1991). *See also The Development of the Expanded IMET Initiative*, 14 DISAM J., Fall 1991 at 94; Dep't of Defense, Defense Security Assistance Agency, *EIMET Course Catalog, Fiscal Year 1993*. Of the over 2,000 courses taught at approximately 150 U.S. military schools and installations and through on-the-job training, observer training, and mobile education teams, 61 were initially found to qualify under the expanded IMET criteria. *Id.*

offerings."[20] Immediately, DRMI and NJS set about developing specific courses to address the E-IMET criteria.

The Defense Resource Management Institute was already providing stateside training focused on enhancing the understanding, competence, and capabilities of U.S. and foreign military and civilian personnel in the development, operation, and maintenance of public sector management systems. Its existing four-week graduate level course was easily modified into a two-week course capable of being taught overseas by a mobile education team. During fiscal years 1992 and 1993, DRMI teams taught in over 14 countries located in Central and South America, Africa, Central Europe, and the Pacific.[21] For example, three courses were offered in Honduras; the first course taught civilian and military personnel who now serve as professors in Honduras' National Defense College. This college, established with U.S. aid at the request of the Honduran Congress, trains civilians in defense resource management. It presents a perfect opportunity to provide E-IMET training.[22]

By the end of calendar year 1992, NJS had: (1) developed a three-phase executive course on human rights, civilian control of the military, and military justice systems; (2) developed a three-day course to train U.S. military educators and program coordinators how to train U.S. military personnel on human rights;[23] and (3) produced an Expanded Informational

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[20] Message, Defense Security Assistance Agency, subject: Expanded IMET Initiative (291623Z Jul. 1991); Memorandum, Acting Director, Defense Security Assistance Agency, I-003315/91 (Aug. 27, 1991)(on file with the author).

[21] Telephone conversation with Mary Anders of DRMI (Jan. 21, 1994). The countries receiving training include Honduras (3 times), Argentina (3 times), Botswana (regional conference), the former Czechoslovakia, Hungary (2 times), Poland, Chile, Bulgaria, Ghana, Zimbabwe (regional conference), Sri Lanka, Czech Republic, Senegal (regional conference), and Lithuania (regional conference). Overall, 552 military and 255 civilian personnel have received instruction as of December 1993.

[22] GAO, *supra* note 6, at 22.

[23] The 3-day, human rights trainers' course was developed at the request of numerous commands that were tasked with training Americans to go overseas as part of the Security Assistance program. The Unified Commander of the Southern Command has a specific requirement that servicemembers ordered to its operational area receive this training prior to leaving the United States and it is clearly desirable for all personnel who are required to spend time in a foreign country. This course was taught in Dec. 1992 and Apr. 1993, at NJS and in Jun. 1993 at Little Creek, Virginia. *See*

Program Handbook on U.S. constitutional rights and responsibilities and U.S. history for use in conjunction with Informational Program[24] activities for international students training in the United States. In addition, numerous presentations on these subjects had been delivered both in the United States and at conferences overseas.[25]

The centerpiece of the NJS effort has been the five-day, three-phase, executive training program.[26] By early 1994, the multi-phased program had

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Memorandum, Headquarters, U.S. Southern Command, subject: Human Rights (May 1991) (on file with the author).

[24] Dep't of Defense, *Informational Program for Foreign Military Trainees in the United States*, DOD Directive 5410.17 (Mar. 1, 1985). This directive requires that all international students attending a formal military course be exposed to a DOD-managed Informational Program designed to assist them in acquiring an understanding of U.S. society, institutions, and values, including an awareness of the U.S. military's role in a democratic society and an appreciation of our respect for internationally recognized human rights.

[25] In addition, the NJS staff has offered to work with any U.S. military educational institution to design specific modules of training on human rights, civilian control of the military in a democracy and military judicial systems to meet the needs of the institution focusing either on teaching U.S. or international students. Such modules have already been designed for the Army's Judge Advocate's General School in conjunction with a Southern Command funded initiative with the Peruvian military. *See* Jefferey F. Addicott & Andrew M. Warner, *New Missions for JAGs: Promoting the Rule of Law in Militaries of Emerging Democracies*, 15 NAT'L SEC. L. REP., Mar. 1993 at 1. Significant assistance was rendered by the NJS to the development of the teaching materials utilized in the Army's Peruvian program. Similar modular development has been discussed with the DISAM for many of its courses. During Fiscal Year 1993, the NJS developed a 5-day course on Human Rights and Military Operations for line officers of any military force. This course is targeted for both international and U.S. officers and is designed to teach not only the basics of human rights, but also how these considerations fit into the planning and conduct of military operations. The course includes consideration of such fundamental concerns as Rules of Engagement, the Law of Armed Conflict, and the role of a military justice system in the accomplishment of military objectives.

[26] Recent efforts to better coordinate the military-to-military contacts program and IMET / E-IMET training programs have resulted in the execution of an agreement between the joint staff and DSAA delineating the scope and purposes of each program. Military-to-military monies will be used for conferences and seminars to develop contact with and improve communication with the foreign militaries, while IMET \ E-IMET funds will be used to implement programs for direct ***training*** of foreign militaries and, in the case of E-IMET, senior civilian and legislative representatives. Message, Defense Security Assistance Agency, subject: Appropriate Funding for IMET/E-IMET Programs (251700Z

been completed in eight countries and similar seminars had been presented to the international students at the Air War College, the Air Command and Staff College, and the Navy Hydrographic School.[27] The unique features of this course are its phased development,[28] the heavy utilization of small

Feb. 94) [hereinafter DSAA Message].

[27] Those countries include Sri Lanka (twice), Papua New Guinea (twice), Guatemala, Senegal, Madagascar, Rwanda (twice), Philippines, and Bolivia. Seminars in progress include Sierra Leone, Lithuania, Ukraine, Latvia, Honduras, Hungary, and Zimbabwe. Additional countries scheduled for training in Fiscal Year 1994 include Niger and Columbia. Overall, 600 military and 300 civilian students have received this training. The number of courses actually taught would have been greater if funds had not been withheld by Congress from Peru, El Salvador, and Guatemala.

[28] In the first phase of the NJS's three-phase program, a survey team of two to three joint service instructors visits the host country to meet with military, governmental and non-governmental personnel and organizations in order to assess the present status of human rights and civilian control of the military in the host country, and to evaluate its military justice system in practice. The initial survey is followed by a visit by four to six representatives of the host country (again with proper State Department and DOD approval) to the U.S. where they are given the opportunity to observe the U.S. military and civilian criminal justice system both being taught to U.S. students and, in action, through visits to local military and civilian courts and detention centers. In addition, the proposed curriculum for that nation, developed from the information gathered in the initial survey, is fully discussed and refined with the visiting representatives so that it is host-country specific. Frequently, one or more of the host country representatives is tasked with preparing one-hour segments for Phase III of the seminar, usually dealing with that country's military and civilian justice system. By the time the host country representatives leave the United States, it is intended that they will have come to regard the seminar program as at least partially their own creation. In Phase III, a joint service team of three to four instructors returns to the host country to present the seminar to 40-60 relatively senior military and civilian government officials. After completion of the initial phases, the NJS provides continuing education courses. Continuing education has included topics like training to host country human rights instructors, courses n regulation drafting, and a litany of courses specific to the host nation.

group discussion problems,[29] and the ability of the NJS staff to make the seminar host-country specific.

The Executive Training Program and follow-on courses have been favorably received by the students, the host country, the U.S. Ambassador and the CINCs.[30] While there might be some reluctance to receiving instruction in these subject areas, the mobile education teams, like those from the DRMI and the NJS, tailor their training to the specific country concerns and overcome the initial resistance. Furthermore, particularly in developing countries, this training is often seized upon by the host nation as a means to create a dialogue within their military and civilian leadership concerning fundamental issues of human existence and the role that the military plays in their society.[31]

Both the Defense Resource Management Institute and the Naval Justice School realized that their programs had to be closely coordinated with the cognizant Unified Commander and the in-country office of the U.S. Security Assistance Organization,[32] as well as with the desk officer for the host country at the U.S. State Department and the in-country State Department team, in order to stand any chance of success. In attempting to

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[29] Another of the unique features of the course is that the class is divided into three to four heterogeneous discussion groups which are tasked to solve numerous hypothetical problems and role-playing situations specifically founded on the host nation's present circumstances. These discussion problems, which are assigned following blocks of informational lecture, provide all participants the opportunity to relate the concepts taught to actual "real time" situations and to participate in the problem solution. Each group then presents its solution for general group discussion when the class is reunited in the problem "wrap-up." The discussion group method of learning, although heretofore typically unused as a military teaching technique in most host nations, is quickly appreciated and fully exploited by the participants. *See* Dep't of the Navy, The Naval Justice School, *International Training Programs in Military Law and Human Rights, Fiscal Years 1995/1996.*

[30] *Id.* (reprinting letters, memorandums and messages from foreign officials and U.S. officials alike praising the program developed by the NJS).

[31] For example, the presence of the Sri Lankan Security Police in the seminar served as the first instance in which there had been any coordinated training between the military and the Security Police, despite the fact that the Security Police were technically responsible for investigating alleged human rights violations arising out of the Sri Lankan civil war.

[32] SAMM, *supra* note 18, at paras. 30,002.C.8, 30,002.C.10-.C.12.

work within the existing system, however, it soon became apparent to both the instructors at NJS and their program coordinators at DSAA that there were several operational shortcomings. For example, in the U.S. European Command (EUCOM), there appeared to be little or no coordination between the CINC's staff, leading to the deferment by DSAA of a NJS training initiative in the Baltic states.[33] In the U.S. Southern Command (SOUTHCOM), the breakdown occurred between DSAA and the CINC's staff; the CINC was surprised by unexpected training initiatives in Guatemala.[34] In almost every instance there appeared to be poor communications between the U.S. Embassy and the CINC's staff and little coordination between the Ambassador's country plan and the CINC's regional strategy for that country. Frequently there appeared to be duplicative training efforts within the various services and almost no established method to track the various programs being offered. Likewise, no one monitored and evaluated the effectiveness of the training.[35] Therefore, despite the CINCs frequently stated need for IMET, in 1994 Congress cut IMET by fifty percent.[36] This cut will detrimentally impact on the amount of training conducted.[37]

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[33] DSAA Message, *supra* note 26 (the EUCOM staff was attempting to utilize military-to military contact monies to fund the NJS training program).

[34] The CINC's staff was apparently unaware that DSAA had agreed to provide the NJS seminar as a first step toward releasing IMET monies allocated to Guatemala. The expenditure of these monies had been placed on hold because of Congressional concerns over the Guatemalan military's human rights record.

[35] For example, when NJS first introduced its program into SOUTHCOM both the Army and Air Force were sending METs into the region to provide training in both military justice, law of war, and military codes of conduct. These programs were two to three day snapshots of how the U.S. system worked with no provision for developing follow-on training or to ensure that any action was taken by the host country in response to the training.

[36] The fiscal year 1994 IMET allocation was reduced to $21.25 million from fiscal year 1993 funding of $42.5 million. However, proposed funding for "direct training" in fiscal year 1995 has been increased to $26.35 million of which $850,000 is earmarked for peacekeeping. MSA, *supra* note 2, at 44.

[37] Although $4.0 million of the FY94 IMET budget has been tentatively allocated to E-IMET programs, over 20 training programs have been identified as qualifying for E-IMET funding. *See* Dep't of Defense, Defense Security Assistance Agency, *Expanded IMET Initiative Handbook* (rev. 2) (Mar. 1994). Thus, the newly created programs specifically geared to meeting the E-IMET requirements, such as the Program on Civil-

B. Military-to-Military Contacts

Each of the 5 CINCs controls a separate discretionary training budget for use within his area of responsibility. These funds are not subject to DSAA control or review, and can be used to foster military-to-military contacts. The various discretionary training budgets, taken together, exceed the total monies allocated by DSAA to E-IMET and, as proposed for 1995, will be more than double the entire IMET budget in 1994.[38] These discretionary funds have been used to promote democratization and military justice programs. Unfortunately, with minimal coordination within the DOD there is no assurance that the programs offered are of the type and quality needed.[39]

Another Title 10 program allows the DOD to pay the travel, subsistence and similar personal expenses of military personnel from developing countries in conjunction with their attendance at bilateral or regional conferences. Pursuant to this statutory authority, recently, seminars

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Military Relations at the Naval Postgraduate School in Monterey and the Executive Training Program developed by the Naval Justice School may not receive funding priority by in-country Security Assistance teams presented with the current smorgasbord of possible course options. In addition, the overall IMET budget reduction, coupled with the earmarking of funds for E-IMET, has had the unintended consequence of forcing the security assistance officers to choose between "hard" technical and professional courses and "soft" programs such as human rights and civil-military relations. This has resulted in a request from SOUTHCOM that the courses identified as qualifying for E-IMET funding be expanded to include all of the senior professional military education courses. *See* Message, Headquarters, U.S. Southern Command, subject: Proposed Earmarks for Expanded International Military Education and Training (121320Z Apr. 94) (expressing the opinion that DSAA's "earmarking" funds for E-IMET programs is cutting into already limited training dollars and that DSAA is "force-feeding" the current E-IMET programs to the host nations).

[38] *See* Dep't of Defense, *Defense Military-to-Military Contacts and Comparable Activities* (draft) (Jan. 27, 1994) (on file with the author).

[39] For example, these funds have been expended to send a team of EUCOM military attorneys into Eastern Europe to give presentations on the U.S. military justice system, to deploy a military lawyer to Albania for six months where she assisted in drafting a new Albanian Constitution, and in developing basic regulations to establish a military justice system. Beverly Dart, *After-action report regarding TAD assignment to Military Liaison Team (MLT) Albania from July to December 1993* (unpub.) (Feb. 3, 1994) (on file with the author).

have been conducted on topics which include democratization, civilian control of the military, and the law of war.[40]

In addition, in 1993, the U.S. Congress gave funds to the countries of the former Soviet Union, for their demilitarization. The 1993 budget, for example, provided $15 million for military-to-military contacts with these countries[41] and the proposed 1995 budget includes an additional $4.5 million.[42]

III. PROPOSED LEGISLATIVE CHANGES

The Clinton administration has recently put forward a wide variety of proposals for specific legislative and regulatory changes in this area.[43] The common objective is to transform security assistance into a more effective instrument of U.S. foreign policy. Part of the discussion draft of The Peace, Prosperity and Democracy Act of 1994 would allow the Secretary of State to decide whether the aid package for all countries should include military assistance.[44] Furthermore, it designates the Secretary of State as the direct overseer of all U.S. international aid programs. This proposal largely abandons foreign assistance programs conceived during the Cold War and gives the President broad flexibility to promote the administration's foreign policy objectives of "promoting sustainable development . . . promoting

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[40] Mark E. Rosen & Charles N. Parnell II, *Peacemaking for the 90's: Expanded International Military Education and Training* 6 (unpub.) (1994) (on file with the author).

[41] *See* Pub. L. No. 102-396, 106 Stat. 1876. The goals of this "Nunn-Lugar" program have been to promote: 1) civilian-military relations appropriate to democratic societies; 2) openness and transparency in defense establishments, policy, doctrine, forces, budgets, and programs; and 3) cooperation, education, advice and training in areas of shared security interests.

[42] Interview with Commander Keith Baker, staff member of the Joint Chiefs of Staff (Apr. 28, 1994).

[43] Goshko & Lippman, *supra* note 11, at 1.

[44] H.R. 3765, 103 Cong., 2d Sess.

democracy . . . promoting peace . . . providing humanitarian assistance . . . [and] advancing diplomacy."[45]

The President's proposed change in security assistance administration, though profound and quixotic, faces stiff resistance. The proposal may require sweeping organizational changes. In addition, there is congressional concern that the proposal, as written, provides for less congressional oversight and concentrates too much discretionary authority in the hands of the White House and State Department.[46] The President has yet to focus on this legislative initiative, and his reticence, in light of other more pressing issues, is understandable. What is perhaps most significant and positive is that the proposed bill represents a shift by the Clinton Administration from a ***program*** to a ***goal*** orientation for U.S. "security assistance" funding.

IV. SUGGESTED CHANGES IN PROGRAM IMPLEMENTATION

The executive and legislative branches can take a number of immediate steps that will put the United States on the road to a national security policy that more fully integrates foreign assistance programs, like E-IMET. First and foremost, the President needs to clearly articulate his national security policy and ensure that the Secretary of Defense is capable of carrying out his vision. If military assistance is part of the strategy to implement that policy, and it is hard to imagine that some form of military security assistance will not be part of the program adopted, then the recent trend toward a disproportionate cutting of the funding for such programs must be reversed. This is particularly true for military education and direct training programs focused on the E-IMET criteria.[47]

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[45] Goshko & Lippman, *supra* note 11, at 6.

[46] *Id.*

[47] Recent 50% cuts in IMET funding for countries outside of Eastern Europe and the CIS, coupled with the "fencing" of additional remaining monies for E-IMET, has had the unintended result of forcing the in-country security assistance teams to "push" a course on Human Rights and Military Justice over technical and professional military training that the host country needs to maintain the readiness of its armed forces. These pressures may create an insurmountable barrier to the teaching or implementation of the concepts covered in the 5-day executive seminar.

A mechanism also needs to be found to coordinate the widely disparate U.S. foreign security assistance efforts.[48] A central "clearing house" for this training must be established both within the DOD and between the DOD and the State Department. An attempt to implement such a position within the DOD was an integral part of the proposal for the creation of the post of Assistant Secretary of Defense for Democracy and Human Rights. Although establishment of that position was abandoned by the Administration, the need still remains for a person or organization to be empowered to monitor, manage, and coordinate the various programs administered by DSAA, the programs administered by the CINCs and any new initiatives. As competition for scarce training resources increases, the need for careful coordination of effort within the DOD becomes imperative. Through the establishment of a "clearing house" the DOD can work with the CINCs in planning each country's training schedule. In particular, there is a growing need for one central point in the DOD to establish appropriate criteria to validate the academic and military usefulness of the numerous courses presently being touted to the CINCs as "democracy" or "human rights" training. The "clearing house" can also act as a congressional liaison to answer questions on how the money earmarked for "soft" training is being spent and its effectiveness.

Congress needs to be urged to reassess the growing number of restrictions, limitations and prohibitions that are attached to U.S. assistance programs.[49] The restrictions are often imposed in response to allegations of human rights abuses. The focus, however, should not be on how many human rights violations were reported in a given country, but whether those reports were valid and, if valid, whether they were properly investigated and appropriately prosecuted. Moreover, the limitations imposed by Congress have the paradoxical effect of denying human rights, democratization and resource management training to the countries that historically are the most

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[48] For example, in fiscal year 1992 16 separate government agencies spent in excess of $660 million on over 80 different international training programs—many of which contained a human rights or democratization component. *See Observations on International Educational, Cultural, and Training Exchange Programs: Hearings Before the House Subcommittee on International Relations*, 103 Cong., 1st Jest. 93 (1993) (statement of Joseph E. Kelly).

[49] Louis J. Samelson, *New Security Assistance Legislation for Fiscal Year 1993*, 15 DISAM J., Winter 1992/93 at 29. FAA, *supra* note 11, at §502B (as codified in 22 U.S.C. § 2304) ("no security assistance may be provided to any country the government of which engages in a consistent practice of gross violations of internationally recognized human rights").

in need of, and theoretically could benefit the most from receiving such training.[50] Congress needs to adopt a long range approach in their evaluation of this training, and to continue to encourage the implementation of the E-IMET criteria by endorsing and fully funding the new E-IMET courses, especially in those countries with the greatest need for these programs.

V. OPERATIONAL INITIATIVES

Recently U.S. Pacific Command (PACOM) has implemented a planning matrix to better manage the various "military outreach programs" within its region. The matrix is designed to show past, as well as projected, military activities. The matrix divided into seven categories for each of the 40 countries in the PACOM's area of responsibility.[51] The 7 categories include 1) high level visits, 2) multilateral conferences, 3) exchanges, 4) direct training, 5) joint and combined exercises, 6) bilateral activities, *e.g.*, port calls, and 7) other miscellaneous operations. The matrix provides the CINC with an historical data base of prior activity within a particular country or country group, as well as a planning mechanism and predictive tool.

The implementation of the matrix has proved to be beneficial by enabling the Unified Commander greater unity of effort and economy of force in his forward presence mission. In particular the "cooperative engagement" matrix enables the CINC: 1) to immediately access an historical data base of prior activity with a given country; 2) to ensure a balanced approach to support his regional strategy; and 3) to highlight elevated U.S. military involvement within the region. For example, comparing U.S. forward presence activities with South Korea and Japan, the U.S. Pacific CINC is able to see that, although the number of contact and training programs are nearly equivalent, in the most critical areas of joint and

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[50] For example, funding for a proposed second NJS Executive Seminar in Guatemala in fiscal year 1993 was withheld and then withdrawn due to congressional resistance to providing any training to the Guatemalan military because of perceived failure to properly investigate alleged human rights violations.

[51] Telephone conversation with LtCol Jim Fondren, USAF, member of the CINC's staff in PACOM (Apr. 28, 1994); Point Paper by LtCol Fondren, subject: Mechanism for Managing USPACOM Strategy (18 Nov. 1992).

combined exercises and bilateral programs, South Korea clearly leads Japan.[52] This is exactly what the CINC would expect in correlation to his assessment of the perceived threat to U.S. interests. The matrix also highlights countries that are running out of IMET monies and enables the CINC's staff to augment U.S. presence in these countries with other programs. In addition, this computerized report is being utilized to track whether the CINC's operational goals and objectives for each country are being met.[53]

Nevertheless, the matrix fails to address three additional issues which are particularly critical to the successful implementation of the "soft" training programs for "promoting peace" and "building democracy"—measuring the effectiveness of the training, coordination of program effort within the CINC's staff, and with the joint staff, and coordination of the training provided with the military exercises administered by the component commanders.

Measuring the effectiveness of training in this area is extremely difficult. There is no guarantee that just because some military members receive training in civilian control of the military or human rights that conditions throughout the country will improve. Issues of this type require a broad spectrum of statutory changes, military instructional changes, a broad-range training effort, and a ***commitment*** by the entire power structure within the country to change.[54] Measurement of success must be long

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[52] Briefing by LtCol Jim Fondren, USAF, on the *Cooperative Engagement Matrix Assessment* (29 March 1994).

[53] The U.S. Pacific CINC sets specific goals and objectives for U.S. forward presence activities for each country within his area of responsibilities. These goals are set forth in the Pacific Command Strategy. The extent to which these goals are being met or exceeded with current resources is highlighted in the matrix by color codes: green—meeting objectives; yellow—questionable; red—not meeting objectives; white—military contacts are suspended, e.g., China, North Korea, and Burma. Telephone conversation with LtCol Fondren, *supra* note 51.

[54] Measures of success utilized by the Naval Justice School include: 1) an assessment of the course by the in-country team after the course is completed; and 2) host country requests for follow-on training which evidence a commitment by the host country to implement similar ongoing courses of instruction for their military or requests to provide assistance with redrafting host country codes or statutes to more closely comply with the due process requirements of the Declaration of Human Rights. Out of the first three countries receiving the executive seminar, each one has requested additional training. Sri Lanka requested and received an additional two week course aimed at training host

range and look to evaluate trends and gradual movement versus "numbers" of programs completed or military personnel "trained" or "contacted." In addition, the CINC's staff should carefully review the course content and the proposed teaching methodology to insure that the program will be tailored to the specific needs of the host nation and will not be a "one time, off the shelf, one course fits all" approach. A measure of a program's success, for example, would be the host country's willingness to seek follow-on training and the creation of an indigenous training program.

The Unified Commanders also need to carefully evaluate the method by which this "soft" training is delivered and coordinated. The service Judge Advocates have taken the lead with respect to international legal training and exchange programs through the signing of a Memorandum for International Military Legal Education and the establishment of a Joint Committee to monitor the training.[55] The establishment of this committee was a direct outgrowth of the Naval Justice School's E-IMET initiatives and the perceived need to monitor and coordinate the planning, programming and implementation of all military justice activities including E-IMET, Subject Matter Expert Exchanges, and military-to-military contact programs funded by the CINCs discretionary funds.

Unfortunately, this joint service coordination of training only extends to legal training sponsored by the service JAGs and does not apply to the ***ad hoc*** democratization and human rights training being offered under the sponsorship of the various Unified Commanders. For example, courses offered by the U.S. Army Reserve's civil affairs units, while purporting to cover similar areas of subject matter expertise as those assigned to the E-IMET program (e.g., civil-military relations and the role of the military in a democracy) are not monitored nor subject to any scrutiny by the State Department, DOD Training Commands, or DSAA. In several cases, courses

country trainers to teach their junior officers and senior enlisted the fundamentals of the Law of War. Papua New Guinea received an additional executive training program and has recently requested assistance in redrafting their entire military judicial code. Guatemala has requested a second executive training program and legal training for their Naval officers, but because of Congressional resistance to funding any training for the Guatemalan military due to previously alleged human rights violations, that follow-on training has yet to be delivered.

[55] Memorandum of Understanding between the Judge Advocate General of the Army, the Judge Advocate General of the Navy, the Judge Advocate General of the Air Force, and the Staff Judge Advocate to the Commandant of the Marine Corps, subject: INTERNATIONAL EDUCATIONAL EXCHANGE PROGRAMS (25 May 1993).

have been offered in direct competition with, and to the ultimate exclusion of, DSAA approved E-IMET courses.

The U.S. European Command recently was reprimanded for attempting to fund its E-IMET training programs with its military-to-military contact funds.[56] In the past, EUCOM's military-to-military contact funds have been used to conduct unauthorized training rather than the approved seminars and familiarization tours.[57]

These events highlighted both a lack of understanding of the purposes of the separate programs by the members of the CINC's staff and poor coordination among the CINC's staff. These shortcomings were recognized by the CINC and EUCOM has now adopted the matrix system used by PACOM.[58] In addition, EUCOM has implemented "synchronization committees" within its joint staff to insure that both training and operations are aware of and coordinate the implementation of all ongoing initiatives within EUCOM in area of responsibility to avoid duplication of effort and to ensure a balanced approach for implementing the CINC's strategy.[59]

Finally, and perhaps most importantly, the planning matrix will only prove to be useful if it is also adopted by the CINC's component commanders as a management tool. The component commanders largely control the funding and implementation of military exercises within the area of responsibilities. These individual service commanders must be told to use the matrix as a management tool and to integrate their training exercises with the direct training and military-to-military contacts initiatives implemented by the CINC's. Until the "hard" military exercises actually test the training received by the host nation in these "soft" areas, the necessity for these programs will continue to be questioned by the host nation and ultimately the success of these programs will be endangered.

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[56] DSAA Message, *supra* note 26.

[57] *Id.*

[58] Telephone Conversation with LtCol Jim Fondren, USAF, member of the CINC's staff in PACOM (Dec. 17, 1994).

[59] Interview with Commander Keith Baker, *supra* note 42.

VI. CONCLUSIONS

Changes in both the international and domestic political environment have created a rare opportunity to refine, concentrate, and refocus the entire security assistance program which the President, Congress, the State Department, and the DOD cannot afford to ignore. At the very least, DOD should seize this opportunity to expand DSAA's authority as DOD's centralized joint service agency for security assistance training to include the review, validation, coordination, and evaluation of the disparate international military training courses, seminars and familiarization programs presently being offered with Title 10 and Title 22 monies.

The combined military program provided to each country receiving assistance should be prepared by the CINC, in coordination with the regional ambassadors, and centrally monitored within DOD by DSAA. The goal should be to eliminate duplication of training efforts and other educational programs and to ensure that the composite DOD program provided to each country is both appropriate and carefully planned and evaluated. In addition, each CINC needs to develop a mechanism similar to USPACOM's "Cooperative Engagement Matrix" to track whether the CINC's operational goals and objectives for each country are being met. In addition, the CINCs need to direct their component commanders to ensure that their "hard" military exercises test the training received in these "soft" areas. Finally, each CINC should implement "synchronization committees" within their joint staff to ensure that both training and operations are aware of all ongoing initiatives within their AOR. The Unified Commander also needs to address an additional issue which is particularly critical to the successful implementation of the "soft" training programs for "promoting peace" and "building democracy"—measuring the effectiveness of the training.

In an era in which the allocation of resources for direct international military training and military contact programs is in doubt, the effective coordination and evaluation of the CINC's "security assistance" effort becomes imperative if such efforts are to continue to be perceived by Congress to be an effective enabler of American military influence and leverage.

HIGH SEAS: THE NAVAL PASSAGE TO AN UNCHARTERED WORLD

by Admiral William A. Owens, USN
Naval Institute Press, Annapolis, MD (1995)

Colonel James P. Terry, USMC *

This challenging new book by Admiral Owens, the Vice Chairman of the Joint Chiefs of Staff, undertakes three very significant tasks. First, it explores the important relationship between new military technology and the conduct, present and future, of naval operations. Admiral Owens makes the case that one cannot conduct naval planning (or joint planning) without taking advanced technology into careful consideration at both the strategic and tactical levels. Second, *High Seas* accurately and forcefully portrays the international significance of advanced U.S. military technology as it relates to U.S. Naval Forces in their intercourse with the forces of other States—and to our political-military coordination with those States. Finally, this rich text dissects the military thinking which undergirds our traditional operational concepts and doctrine and suggests that an operational template for the future must include high technology adaptive force packaging with components from all services, thus enabling joint military operations to ensure battlefield dominance.

The text is structured around naval technological developments and their impact on naval operations but is equally applicable to all U.S. military activities. A critical assumption underlying the text is that overseas naval forces will become the bridge for U.S. Army and Air Force units to maintain working relationships with their foreign counterparts as foreign basing decreases.

This thoughtful and highly readable work is divided into three logical sections. The first four chapters examine the new post-Cold War international environment and the role naval power can play in deterrence, overseas presence, advances in military technology and ways to coordinate security policy more effectively. The second part, and in my view the most important, includes but one chapter, entitled "Operations." This carefully written chapter reviews the context in which forces will operate internationally in the new environment and the role Naval forces will be

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* *Colonel James P. Terry, USMC, serves as Legal Counsel to the Chairman of the Joint Chiefs of Staff, a position he has held since July 1992.*

asked to play vis-a-vis the Army and the Air Force in joint operations. Critical issues addressed in depth include in addition to a thorough review of joint operations, the meaning of Navy-Marine Corps integration, how naval operational configurations will change, and what these considerations imply for undersea, surface, and air operations. The last part, encompassing the final four chapters, examines the size and structure of the naval force required for Force 2021 if the logic, rationale, and conceptual development begun by the current Force 2001 planning is continued.

This is a book for the thinking public. The author's courage in addressing tough, controversial questions about our nation's future naval and defense needs comes at a time in which it is fashionable to ignore our past when addressing the future. The ultimate value of this book is that it educates us to think about the integrated whole of our national defense priorities—to include the relative roles of threat, force structure, strategic planning, and joint operations—in the context of technological advances.

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Lieutenant Commander, JAGC, U.S. Navy
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